

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Roanoke Division

COREY E. JOHNSON,

Plaintiff,

v.

CASE NO.  
7:20cv582

(K-9) OFFICER McCOWAN, et al.,

Defendants.

VIDEOCONFERENCED

DEPOSITION UPON ORAL EXAMINATION

OF PATRICK H. HURLEY

TAKEN ON BEHALF OF THE DEFENDANTS

Richmond, Virginia

September 13, 2022

KATHLEEN BEARD ADAMS, CCR, RPR, CRR

Court Reporter

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22

23

24

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1                   Videoconferenced deposition upon oral  
2                   examination of PATRICK H. HURLEY, taken on behalf of  
3                   the Defendants, before Kathleen Beard Adams, CCR,  
4                   RPR, CRR, sworn by William J. Hudson, e-Notary  
5                   Public for the Commonwealth of Virginia at large,  
6                   taken pursuant to notice, commencing at 10:04 a.m.,  
7                   on September 13, 2022; and this in accordance with  
8                   the Federal Rules of Civil Procedure.

9                   - - - - -

10                   PATRICK H. HURLEY, having been first  
11                   duly sworn, was examined and testified as follows:

12                   EXAMINATION

13                   BY MR. DAVIS:

14                   Q.       Good morning, Mr. Hurley. My name is  
15                   Timothy Davis. I'm an attorney for the defendants  
16                   in this case.

17                               Could you please state your name for the  
18                   record?

19                   A.       Yes, sir. Pat Hurley, H-U-R-L-E-Y.

20                   Q.       And, Mr. Hurley, are you an expert  
21                   witness retained by the plaintiff in this lawsuit?

22                   A.       I am.

23                   Q.       And could you describe for me what you  
24                   consider to be the scope of your expertise that you  
25                   are offering here?

1           A.     I laid that out in the beginning of the  
2 reports, to look at the policies, procedures,  
3 practices, and to see if the force used upon  
4 Mr. Johnson was necessary, appropriate, or  
5 excessive. I'm paraphrasing.

6           Q.     Understood. You authored the initial  
7 expert report and rebuttal to the defendants' expert  
8 report in this case, correct?

9           A.     Correct.

10          Q.     All right. I'm going to pull those up  
11 right now.

12                   And so, Mr. Hurley, for use of the  
13 documents today I'll be using the screen share here  
14 in the Zoom. If there is ever a point where you  
15 need me to go to a particular part of the document  
16 or zoom in on something, anything like that, just  
17 let me know and we'll work with that.

18                   Can you see the document that's being  
19 screen shared right now?

20          A.     I can.

21          Q.     Is this your initial expert report?

22          A.     I believe it is. Yes.

23                   MR. DAVIS: All right. I'd like to make  
24 this Defendants' Exhibit 1?

25

1 (Defendants' Exhibit 1 was marked for  
2 identification.)

3 BY MR. DAVIS:

4 Q. Can you see this document here?

5 A. Yes.

6 Q. Is this your rebuttal report?

7 A. Yes.

8 MR. DAVIS: All right. I'd like to make  
9 this Defendants' Number 2.

10 (Defendants' Exhibit 2 was marked for  
11 identification.)

12 BY MR. DAVIS:

13 Q. Mr. Hurley, do you have copies of these  
14 reports aside from the screen share available for  
15 your access here?

16 A. I do.

17 Q. Okay. So it may be a little easier when  
18 we're talking about the report itself, since we'll  
19 be talking about those a lot, to not just have that  
20 constantly up on screen share. So I'm going to take  
21 those down. There will be some other documents I'll  
22 be putting up here today.

23 A. Understood.

24 Q. Given your expert experience,  
25 Mr. Hurley, I would guess you've been deposed

1 before.

2 A. Yes.

3 Q. Okay. So I'll skip the preliminaries  
4 here.

5 Just a couple of questions for you. Did  
6 you speak to anyone to prepare for today's  
7 deposition.

8 A. Yes, I did.

9 Q. Who did you speak with?

10 A. Mr. Johnson --

11 Q. How --

12 A. -- Andrew Johnson.

13 Q. Pardon me.

14 How long did you speak with Mr. Johnson?

15 A. Maybe 45 minutes.

16 Q. Did you review any materials to prepare  
17 for today other than those that you've listed in  
18 your reports?

19 A. No.

20 Q. Is there any reason you feel you'd be  
21 unable to testify today?

22 A. No.

23 Q. So I'd like to ask a couple of questions  
24 about your background.

25 You have experience working in



1 corrections, correct?

2 A. Yes.

3 Q. Could you describe your corrections  
4 career for me?

5 A. It started in 1980 at the Chillicothe  
6 Correctional Institute, Chillicothe, Ohio, where I  
7 was a substance abuse counselor. Then I transferred  
8 to the Department of Developmental Disabilities for  
9 a two-and-a-half-year stint working at a facility  
10 for those folks who had disabilities. Went back to  
11 Chillicothe as a case manager/ classification  
12 specialist, worked in various positions. Moved over  
13 to Ross Correctional Institution, a new institution  
14 which was opening, and went and worked at a field  
15 facility for -- I can't remember how -- about six or  
16 seven years. Worked at five different facilities.  
17 Did headquarters twice. Was a deputy warden for ten  
18 and a half years, a warden for about five and a half  
19 years, was their special forces commander for about  
20 a year and a half. Without looking at my CV, these  
21 are rough estimates. And then finished my career in  
22 the headquarters as the bureau chief for  
23 construction and maintenance, which was responsible  
24 for all the large capital projects for the agency.  
25 And that was my experience or tenure with the Ohio

1 Department of Corrections.

2 Then I worked for the Ohio Department of  
3 Youth Services as a consultant for about six and a  
4 half years to help them get into compliance with --  
5 or the conditions of complying with a consent  
6 judgment. Specifically I was responsible for  
7 helping them getting into compliance with the  
8 use-of-force stipulation of that consent judgment.

9 Q. And is that the Stickrath case you're  
10 referring to there?

11 A. Yes. Yes.

12 Q. Okay. So I'll come back to that because  
13 I'm going to have a few questions about that case.

14 When did you last work for the Ohio  
15 Department of Corrections?

16 A. Excuse me. I believe it was 2009, but  
17 again I'd have to refer to my CV.

18 (Reporter clarification).

19 A. It should be on my CV. I have it as  
20 2008. Sorry.

21 BY MR. DAVIS:

22 Q. Was there any point in your corrections  
23 career when you worked as a security officer?

24 A. There was not.

25 Q. And so there would not have been any

1 occasion where you would have used force on an  
2 inmate?

3 A. That's not correct.

4 Q. When would you have done that?

5 A. Throughout my career in literally almost  
6 every position I held I used force. The exception  
7 would be when I was bureau chief for construction,  
8 activation and maintenance. Maybe when I was the  
9 commander of the special forces, or STAR team they  
10 called it. I even used force when I was a  
11 consultant to the Ohio Department of Youth Services.

12 So the unique thing about Ohio  
13 corrections was everyone was trained to use force.  
14 Everyone was expected to respond, even the  
15 secretaries. When I first started my career  
16 secretaries were weapons-trained and they would  
17 stand on the perimeter outside the prison during fog  
18 conditions to prevent a potential escape. So the  
19 approach and the philosophy was different and we  
20 were all expected to know how to do that and we were  
21 expected to respond.

22 Q. Okay. So in addition to having to use  
23 force yourself did you ever oversee or investigate  
24 uses of force by other officers?

25 A. Yes.

1 Q. Would you describe that role for me?

2 A. Okay. That started at the beginning of  
3 my career in 1980 even as a substance abuse  
4 counselor. The institution had use-of-force review  
5 committees, a three-member panel, and they had a  
6 mixture of disciplines sit on that panel. And there  
7 would be the inmates, there would be the officers,  
8 and we'd look at the reports, and as a committee we  
9 would make determinations with independent votes  
10 about whether we felt the force was necessary,  
11 appropriate, or within the guidelines.

12 I did that throughout my career. When I  
13 became deputy warden I was responsible for reviewing  
14 all use-of-force cases. Again there was a committee  
15 evaluation that came to me where I looked at all the  
16 incident reports, the videos, those kinds of things.  
17 Then as warden again was responsible for reviewing  
18 those things, accepting the recommendations or  
19 referring it back for further investigation or  
20 referring it to a different committee for  
21 investigation, any of those types of things.

22 And then in my role with the Ohio  
23 Department of Youth Services as a consultant I was  
24 responsible for designing their use-of-force review  
25 process and then conducting the quality assurance

1 portion of that for all the facilities. So again I  
2 was looking at the videos of the cases, the incident  
3 reports, and the work of those folks who were  
4 assigned the first level of use of force review.

5 Q. Thank you. During your time on the  
6 use-of-force review committee and other instances  
7 where you were reviewing use of force did you ever  
8 review instances of the use of canine force?

9 A. No, because we didn't use canines except  
10 for institutional search purposes. And in my role  
11 with the Nunez monitoring team I reviewed their  
12 policies and had input on that and those kind of  
13 things, which I put references in my report  
14 regarding the Nunez stance about canine -- canine  
15 policy.

16 Q. And I'll also have some additional  
17 questions about the Nunez case.

18 A. Sure.

19 Q. Did you have experience training  
20 officers in the use of force?

21 A. Yes.

22 Q. And in what role?

23 A. Certainly in my role as the inspector,  
24 or I think it's listed as the inspector of  
25 institutional services. That was with Chillicothe

1 Correctional. And spoke at the in-services about  
2 inmate grievance procedures and how I would handle  
3 use-of-force incidents. And then in my role as  
4 deputy warden certainly I spoke at all the employee  
5 in-services and again explained what was appropriate  
6 force, what would be excessive force, those kinds of  
7 things. As warden did the same thing, spoke at all  
8 the in-services and sometimes used some of the cases  
9 we had had to demonstrate what was reasonable and  
10 acceptable force, even high-level force, and when  
11 force was unnecessary or excessive. Then again in  
12 my role with the Ohio Department of Youth Services  
13 taught classes at almost every pre-service class and  
14 then taught all the supervisors about planned  
15 interventions and appropriate force. So, yeah,  
16 that's the experience I can recall at the moment.

17 Q. Other than your work as a consultant or  
18 an expert witness, have you ever been involved in  
19 litigation against either the Department of  
20 Corrections or correctional staff?

21 A. I'm not sure I understand your question  
22 clearly.

23 Q. Have you ever been in a lawsuit against  
24 correctional staff or your Department of Corrections  
25 aside from your work as an expert?

1           A.     Well, as a deputy warden I was the  
2     subject of many lawsuits when I was working in my  
3     career, if that's the question you're asking.

4           Q.     No. And I'm certainly familiar with the  
5     volume of lawsuits that can come with the job, but  
6     have you ever been adverse to your department or  
7     other correctional staff in a lawsuit?

8           A.     Do you mean serving for plaintiff's  
9     counsel or serving for a defendant --

10                     (Reporter clarification)

11           A.     I'm saying that I'm not sure that I  
12     clearly understand what he's asking me. Is he  
13     asking me have I served as a subject-matter expert  
14     for plaintiff's counsel always or have I ever served  
15     as an expert for defendants' counsel?

16     BY MR. DAVIS:

17           Q.     Well, let me ask that question then.  
18     Have you ever served as a subject-matter expert for  
19     defendants in a correctional lawsuit?

20           A.     Yes.

21           Q.     And do you recall what cases those were?

22           A.     I'd have to look at the CV. I know one  
23     was the Maryland Department of Corrections. I was  
24     retained by the Maryland Attorney General's Office.  
25     I was consulted by the South Carolina Department of

1 Corrections. Unfortunately, that was not directly a  
2 use-of-force case. It was a protection-from-harm  
3 case.

4 Q. Was the Maryland Department of  
5 Corrections case -- was that a use-of-force case?

6 A. Yes. Oh, I'm sorry. It was protection  
7 from harm.

8 Q. Have you ever testified as a defense  
9 expert in any use-of-force case?

10 A. At the moment I can't recall that. I  
11 can't recall that specific issue.

12 Q. Are all of the cases listed in your --  
13 in your report civil rights cases brought by a civil  
14 action?

15 A. I believe so. And, again, I'm not an  
16 attorney, so if I misrepresent anything it may be  
17 that I may not understand that it was or was not a  
18 civil case, but it's my understanding that the  
19 majority of them were.

20 Q. You don't recall any criminal cases  
21 you've testified as an expert in?

22 A. No.

23 Q. Are those primarily use-of-force cases  
24 or a range of different kind of claims brought in  
25 those?



1           A.       They're a range.

2           Q.       Okay. Aside from use-of-force cases  
3 what else have you testified to?

4           A.       Protection from harm. They were, I  
5 guess, conditions-of-confinement issues, such as  
6 access to medical care, in-custody death related to  
7 overdose issues, civil rights violations in terms of  
8 racial disparity or equal access to certain  
9 classifications or programs or disabilities. It  
10 could be a mixture of those things.

11          Q.       Did the use-of-force of cases you've  
12 testified in have any incidents involving the use of  
13 a canine?

14          A.       They have not.

15          Q.       Are there any cases that you have  
16 testified in since you submitted your initial  
17 report?

18          A.       Yeah. Well, a very short deposition is  
19 what I want to say. And it was related to  
20 Mr. Lemuel.

21          Q.       Mr. Lemuel is the plaintiff?

22          A.       Yes. I'm trying to find that right now.  
23 I apologize. That would be probably on  
24 page 6 of the CV. It looks like the date is October  
25 2021. And for some reason my printer put gray marks

1 across the right side of my page so I can't see the  
2 whole page, but it looks like Case Number  
3 1:20-cv-01875.

4 Q. All right. I see that one there. So  
5 you recently have given deposition testimony in that  
6 case?

7 A. It was very brief, but yes. We had  
8 internet issues, so after about ten minutes they  
9 decided they would reschedule, and then I believe  
10 they talked settlement.

11 Q. Well, let's hope we don't have that come  
12 up today.

13 I'd like to ask about a couple of the  
14 consulting matters that you've been involved in.

15 Let's first talk about the Stickrath  
16 case. So what do you recall were the facts of this  
17 case?

18 A. As I said, it was conditions of  
19 confinement, so issues related to access to medical  
20 care, access to mental health care, appropriate  
21 levels of educational opportunities and programming,  
22 but primarily excessive force.

23 Q. Was this a class action?

24 A. It was. This was a case that was  
25 brought before the courts before I became involved,

1 so it was already settled by the time they asked me  
2 to come help. I believe the Department of Justice  
3 was involved in that along with the plaintiffs'  
4 counsel. And, yes, it was a class-action  
5 settlement.

6 Q. Okay. And so that was a consent decree  
7 with Department of Justice involvement?

8 A. That's my understanding, yes.

9 Q. And was this involving -- was this  
10 involving adult corrections or juvenile?

11 A. It was juvenile.

12 Q. And did this involve a single facility  
13 or the whole department?

14 A. The entire department.

15 Q. What was your role as consultant?

16 A. It was to evaluate their use-of-force  
17 processes and then to develop a review process and  
18 training programs to help them to come in compliance  
19 with the use-of-force portion of that stipulation,  
20 which they did achieve several years in advance of  
21 the closure of the settlement agreement. It was one  
22 of the first components to be released I guess would  
23 be the legal term. And the use-of-force issue was  
24 never brought back before the courts.

25 Q. And so you said there were -- there were

1 use-of-force stipulations in the consent decree?

2 A. It was -- that may not be the legal  
3 technical term for that, but certainly a major  
4 component of that consent judgment was related to  
5 use of force.

6 Q. Was there a monitor or some other third  
7 party appointed to oversee the settlement?

8 A. There was.

9 Q. And so in your consultant role were you  
10 retained by the monitor?

11 A. No. I was retained by the agency.

12 And I want to clarify something. I  
13 didn't have a traditional contract in the  
14 traditional sense. They had me as, I guess, a  
15 part-time employee, but it was with the  
16 understanding that I was a consultant.

17 Q. Understood. Was there anything in this  
18 case involving use of canines?

19 A. There was not.

20 Q. Okay. Now I want to ask you about the  
21 Nunez case. Actually, before I move on to Nunez,  
22 has the Stickrath case -- has that been closed or is  
23 that still ongoing?

24 A. It was closed. I don't know the exact  
25 year.

1 Q. Okay. Now I'll ask about the Nunez  
2 case. So what is your understanding of the facts in  
3 that case?

4 A. And, again, there's a lot of components  
5 to the settlement agreement, but it was a conditions  
6 of confinement, similar to the one in Ohio; access  
7 to medical care, access to mental health care,  
8 physical conditions of the facility, and excessive  
9 force.

10 Q. Was this also a class action?

11 A. Yes. And again it involved  
12 participation by the Department of Justice. They  
13 joined the plaintiffs' counsel together.

14 Q. And did that also end up as a consent  
15 decree?

16 A. Yes.

17 Q. And do you recall whether the scope of  
18 that case -- well, actually, let me back up.

19 Were the plaintiffs in this case -- were  
20 they convicted prisoners or were they pretrial  
21 detainees?

22 A. It was everybody, so you had a mixture.  
23 They had pretrial detainees, they had some from my  
24 understanding who were awaiting transfer to the  
25 state correctional system, then you also had ICE

1 detainees. So it was a mixture of detention folks.

2 Q. Was -- did this only relate to a single  
3 facility?

4 A. No. New York Department of Corrections  
5 has nine facilities, and one of those is even a  
6 barge that's on the river. So when people refer to  
7 Rikers Island they may think of one jail, but  
8 actually there's several jails on Rikers Island.

9 Q. Okay. So this was -- was this -- did it  
10 cover the entire New York Department of Corrections  
11 or just the Rikers Island complex?

12 A. It's my understanding that it was the  
13 entire department.

14 Q. So what was -- what was your role in  
15 Nunez?

16 A. My role was to review all training  
17 materials related to the consent judgment, to make  
18 recommendations to the monitor on whether to accept  
19 those training materials or require modifications to  
20 those training materials, to observe the actual  
21 training of those subjects. And then to monitor a  
22 large volume of use-of-force cases has been a  
23 mixture; men, women, adults, young adults,  
24 adolescents. I was targeted with focusing on the  
25 adolescents wherever they went and have continued to

1 do that. But, again, I've reviewed use-of-force  
2 cases for every jail in the New York Department of  
3 Corrections.

4 Q. What was your recommendation regarding  
5 the training materials?

6 A. Well, if I felt that the sequence of the  
7 material was out of order, where students wouldn't  
8 necessarily learn the building blocks of the  
9 training program, where perhaps deescalation was out  
10 of sequence, not emphasized properly, whether some  
11 techniques from a defensive tactics or a restraint  
12 standpoint were prone to cause injuries or prone to  
13 have positional-asphyxiant issues, I would make  
14 recommendations regarding that.

15 And it covered a lot of topics in the  
16 use-of-force arena; chemical agents, taser,  
17 defensive tactics, cell extraction, something they  
18 called a probe team, and use-of-force policy  
19 instruction, all the refresher lesson plans, the  
20 crisis intervention.

21 And I'm just trying to focus on things  
22 that would be purely related to use of force. I'm  
23 probably forgetting something, but I've made  
24 multiple reviews of all those training curriculums  
25 and observed those training curriculums, sometimes,

1 more than once, participated in some of those,  
2 including their defensive tactics, and had them  
3 dismiss OC spray only to have that reversed.

4 Q. Did any of that involve use of canines?

5 A. They do have canines, as I said in my  
6 report, so I was tasked with reviewing the canine  
7 policy and making recommendations. I was also  
8 tasked with meeting with the commissioner, their  
9 legal counsel, their emergency services unit, which  
10 has the canine unit, to address concerns and make  
11 recommendations regarding changing some of their  
12 procedures. And then throughout that time I've  
13 looked at their policy with the team and it would be  
14 team recommendations.

15 Q. Were your recommendations accepted by  
16 the monitor?

17 A. Yes.

18 Q. Do you know if your recommendations are  
19 included in any of the monitor's reports that they  
20 filed with the court?

21 A. They most likely would be. They're not  
22 identified as mine. And it wouldn't be just  
23 isolated to issues regarding canines. My  
24 recommendations or narratives may be in many of  
25 those reports, but they're never identified as an



1 individual monitoring team member.

2 Q. Okay. Do you know if the  
3 recommendations that you made -- are those still in  
4 effect with that agency?

5 A. Yes, as far as I know. We're -- that's  
6 still an active consent decree and we're still  
7 actively involved in the monitoring process, so  
8 every month I have things to review related to  
9 Nunez.

10 Q. You also mentioned in your  
11 qualifications consulting with the Department of  
12 Homeland Security. Could you describe what you did  
13 there?

14 A. Okay. And that's one I'm still  
15 involved. So they conduct either virtual or on-site  
16 inspections or investigations of ICE detention  
17 facilities and/or border patrol stations, and I've  
18 done both. And we look at all kinds of conditions  
19 of confinement. It's similar to an American  
20 Correctional Association audit, so we may be looking  
21 at things such as the arsenal inventories, to PREA,  
22 to use of force, to the grievance procedure, quality  
23 of food, clothing. There's a large gamut of things.

24 Q. And is this connected with any active  
25 litigation?

1           A.       No.

2           Q.       Is there any other consulting work --  
3       aside from the expert testimony you've listed and  
4       the work with DHS and the Nunez and Stickrath cases,  
5       any other consulting you've done about use of force  
6       or use of canines?

7           A.       I would say I have with disability  
8       rights of Pennsylvania, and that involved  
9       pre-litigation issues regarding the Department of  
10      Youth Services in Pennsylvania. I did look at a  
11      number of use-of-force cases for them, drafted  
12      recommended use-of-force policies and/or  
13      use-of-force review processes.

14                 There's a small private facility in  
15      Ohio, I helped defend them, but also in that process  
16      spoke with the facility director about things that I  
17      thought they should change, improve, or things they  
18      were doing very well in their use-of-force review  
19      process.

20           Q.       You said that was a juvenile department?

21           A.       Yes.

22           Q.       Any other consulting?

23           A.       No.

24           Q.       All right. In that case I'd like to  
25      move on to the report itself. And before we get to

1 anything with the substance of it I want to ask if  
2 you can clarify for me where your opinions are that  
3 you offer in this report. I see there's a list of  
4 opinions beginning on page 53 and continuing to the  
5 end of the report. Is anything else in the body of  
6 the report offered as an opinion by you?

7 A. Well, I believe that it would. I make  
8 comments throughout all those sections for issues  
9 which I think are the foundations of my opinions.  
10 Particularly the rebuttal report where I disagree  
11 with the defense expert, I explain why I disagree  
12 and then provide the rationale for that  
13 disagreement.

14 So they may not be officially labeled as  
15 an opinion, but I think if I'm saying I disagree and  
16 why I disagree that loosely that would be considered  
17 an opinion, but I've summarized those and provide  
18 the conclusions at the end of the reports.

19 Q. Okay. So that portion at the end is  
20 your list of opinions. And that -- the body of the  
21 opinion preceding that, that's your analysis and  
22 citations in support of those?

23 A. Yes.

24 Q. Okay. So when we get to the end of the  
25 initial report I think we'll want to look back and

1 just so I can better understand which parts of the  
2 report correspond to which of your opinions. We'll  
3 get to that later.

4 So I'd like to start with -- the heading  
5 is IV, Expectations Regarding Use Of Force. It's  
6 beginning on page 4 of your report.

7 On the next page you cite to two Supreme  
8 Court cases, Kingsley versus Hendrickson and Graham  
9 versus Connor. Do you see where those citations  
10 are?

11 A. Are we on page 5 now?

12 Q. Yes, sir.

13 A. Yes.

14 Q. And you refer to those cases as  
15 providing an objective reasonableness framework for  
16 use-of-force incidents, correct?

17 A. Correct.

18 Q. Is that the framework you used to  
19 evaluate the use of force here in this case?

20 A. Yes, in part.

21 Q. Would you elaborate?

22 A. I think I made a reference to a  
23 different case later with that. It spoke about the  
24 need for force, the proportionality, whether the  
25 force was tempered, and relationship to injuries.

1 Q. Is that the Whitley case you cite on  
2 page 8?

3 A. Yes.

4 Q. And so are you using both of those  
5 standards in conjunction here?

6 A. I did. And, again, I'm not a lawyer, so  
7 I'm going to answer that question this way:  
8 Historically there's been, shall we say, a gray area  
9 related to which case law applies to convicted  
10 people versus pretrial detainees, but I think I  
11 explain in my report that the Graham versus Connor  
12 has historically been discussed in corrections as  
13 one of the foundations for assessing use of force.  
14 So, given that it's mentioned by the Virginia  
15 Department of Corrections, I included it in the  
16 discussion.

17 Q. Okay. So also considered the Whitley  
18 case?

19 A. Yes.

20 Q. Okay. So beginning on page 6 you take  
21 an excerpt from an article. It's from a website  
22 PoliceOne.com. The name of the article is Factors  
23 that influence the use of force in a correctional  
24 institution. And that continues on to page 8 of the  
25 report. Do you see that?

1           A.       Yes.

2           Q.       So I'm going to screen share that  
3 article. Can you see this, Mr. Hurley?

4           A.       Yes.

5                   MR. DAVIS: All right. And we're  
6 actually here on page 2 of the article. Madam Court  
7 Reporter, I'd like to make this Defendants' Number  
8 3.

9                           (Defendants' Exhibit 3 was marked for  
10 identification.)

11 BY MR. DAVIS:

12           Q.       There are a few -- there are factors you  
13 list here in this excerpt. There are a few others  
14 that are included in the article but omitted from  
15 your excerpt. Was there any particular reason for  
16 leaving those factors out?

17           A.       There was not. And if so, it may be  
18 related to a download where it maybe didn't capture  
19 everything. So if you display those, I'll address  
20 that, but -- or if I did not, then I probably have a  
21 reason why I did not. I don't recall. I know I've  
22 used this in other reports, so I don't know as we  
23 sit here right at the moment.

24           Q.       And that's okay. I just wanted to see  
25 if there was a particular reason.

1                   There are a couple of the factors that  
2                   you listed here that I wanted to talk about, the  
3                   first being the factor -- the first factor you list  
4                   here, "The need for physical force is reduced in the  
5                   controlled environment that exists in an  
6                   institution."

7                   Could you explain how you think that  
8                   factor is implicated by the use of force in this  
9                   case?

10                A.       Sure. This incident was isolated to one  
11                housing unit. So there's no indication or  
12                information that it was getting out of control or  
13                involved any other area but the area right where  
14                Mr. Johnson and Mr. Guy were engaged in a fight,  
15                just those two.

16                Responders were on the way. It appeared  
17                that Officer Mullins was using his radio before I  
18                was actually able to see the fight on the floor.  
19                From indications in the report those radio calls did  
20                go out, the responders were on the way.

21                And the article is correct.  
22                Correctional facilities by design have the ability  
23                to isolate incidents quickly. I haven't had the  
24                opportunity to see the facility, but looking at what  
25                was available through that video it was contained to

1 that area.

2 Q. So the next factor, "Rapid multiple  
3 officer response minimizes the need for use of force  
4 options."

5 From your review do you recall how many  
6 officers were present during the altercation and the  
7 subsequent use of force.

8 A. Well, there was Officer Mullins, K-9  
9 Handler Baker, K-9 Handler McCowan, I believe a  
10 sergeant responded and/or maybe one other officer,  
11 but those were sufficient numbers for the situation  
12 because, again, the fighters were separated, all the  
13 other inmates were on the ground or sitting and away  
14 from the incident. So it was -- it was a controlled  
15 situation.

16 Q. The next factor listed here,  
17 "Surveillance technology aids in early detection and  
18 suppression of situations that require use of  
19 force."

20 Did you feel that the surveillance  
21 cameras had any effect as far as the way or the  
22 manner that the officers responded here.

23 A. I'm not sure I understand your question  
24 fully.

25 Q. Well, that factor is listed as



1 suggesting that having cameras/surveillance  
2 available in a correctional setting certainly allows  
3 an early intervention by staff. Do you feel that  
4 that had any effect on the outcome of this incident?

5 A. I don't know for certain, but what it  
6 appears was that the response was fairly rapid and  
7 sufficient. There's no documentation to indicate  
8 who may have been viewing the video live, but  
9 traditionally when a call for help goes out, the  
10 control-room officer, or in a similar situation the  
11 folks that have access to those cameras, focus on  
12 that location and/or move cameras so they can see  
13 what's going on, so they have a good assessment of  
14 the magnitude of the situation or the lack thereof.

15 But, again, responders were quick, so  
16 this talks about if the system is working and being  
17 monitored responders get there quickly. And it  
18 appears that was the case in this situation.

19 Q. The next factor states, "The physical  
20 design of the institution aids in the isolation of  
21 problem areas." And you mentioned before in this  
22 instance that the -- you know, the location of the  
23 fight and the response was in the housing unit.

24 Now, as far as the officers and inmates  
25 who were there in the housing unit other than Mr. --

1       excuse me -- Mr. Johnson and Mr. Guy, those -- those  
2       people were not physically isolated from the inmates  
3       who were fighting, correct?

4               A.       I disagree with that characterization of  
5       the scene.

6               Q.       Why is that?

7               A.       I'll admit that they were still out on  
8       the floor of the unit, but there was no one in close  
9       proximity to that fight. There was only one inmate  
10       that I saw. And I believe the rebuttal expert -- or  
11       the defense expert mentioned that one inmate showed  
12       indications he was going to run towards that fight  
13       at one point very early on. That part is reflected  
14       in the video, but that person also quickly stopped  
15       and dropped to the floor and was in the compliant  
16       position.

17                       So -- I apologize. That's an alarm  
18       sounding there.

19                       For effective control that was  
20       sufficient.

21               Q.       But you would acknowledge there were no  
22       walls or cell doors or other physical barriers that  
23       would have obstructed movement on the pod floor?

24               A.       Yes. Correct.

25               Q.       The next factor, "The ability to wait

1 out potential violent confrontations and control the  
2 moment of initial contact reduces the need for  
3 physical force options."

4 Now, here the altercation had already  
5 begun and was in progress at the time the officers  
6 were called to respond, correct?

7 A. Correct.

8 Q. Okay. So this would be distinct from  
9 something like a cell extraction where the staff may  
10 be able to wait out the inmate or choose the time  
11 that they intervene?

12 A. That part is correct, but -- and I  
13 acknowledge that. And one of the clips that I  
14 provided from the Nunez monitor's report related to  
15 the timely use of force to keep everyone safe.

16 So I understand that when inmates are  
17 fighting you have to intervene, and that's what  
18 officers have to do for protection from harm. So  
19 I'm not disputing that they needed to intervene to  
20 stop a fight. They did. And that's not when the  
21 time is to wait, but I do disagree that McCowan  
22 needed to take immediate action when he entered the  
23 door. That's where I think this point applies.

24 Q. Understood. Not listed there as a  
25 separate factor but it's included in that block

1 quote where it states, "Rule violations result in  
2 disciplinary action rather than a physical arrest  
3 process that oftentimes led to physical  
4 confrontations."

5 In this instance the rationale for the  
6 initiation of force was -- at least the rationale  
7 offered by staff you would agree was the need to  
8 control an ongoing altercation; is that correct?

9 A. Are you asking me if I recognize that's  
10 what they offered or that I agree --

11 Q. Right. Right.

12 A. I recognize that's what they offered.

13 Q. So do you think this language here has  
14 any application involving, you know, a delayed  
15 disciplinary charge in lieu of an arrest that could  
16 potentially escalate into a physical confrontation?

17 A. I do because -- and I explain that in  
18 the rebuttal report because I believe a failure to  
19 recognize deescalation of the event based upon the  
20 actions of Mr. Johnson and the actions of everyone  
21 else in the pod -- and I agree with Mr. Burwell's  
22 report where he says Mr. McCowan had his patrol  
23 canine that was trained in protection at his side,  
24 that was an effective barrier against Mr. Johnson if  
25 that was needed.

1           Q.     The last factor listed here is "The  
2     availability of on-site rapid supervisory response  
3     limits the decision-making role of the individual  
4     officer."

5                     From the evidence you've reviewed did  
6     you see whether a supervisor was on site and  
7     available in this instance?

8           A.     It's my understanding a sergeant  
9     responded to that scene fairly quickly.

10          Q.     In your experience is the responding  
11     officer always required to consult with a supervisor  
12     in a time-sensitive response?

13          A.     No.

14          Q.     Okay. The next section I'd like to talk  
15     about here begins on page 8 and is titled  
16     Proportionality Is Key. We've referred to this a  
17     few minutes ago with the Whitley factors that you  
18     list here.

19                     From your review of DOC's canine and  
20     use-of-force policies do you believe these factors  
21     are incorporated into those policies?

22          A.     I do not.

23          Q.     You do not?

24          A.     Correct.

25          Q.     Okay. Could you elaborate on that?

1           A.       And I may not have understood your  
2 question, but are we speaking specifically to the  
3 use of canines?

4           Q.       Let's start with the use-of-force  
5 policy. And I will bring that up, if you'll give me  
6 just a second.

7           A.       Okay.

8                   MR. DAVIS: Madam Court Reporter, let's  
9 make this our Number 4.

10                   (Defendants' Exhibit 4 was marked for  
11 identification.)

12 BY MR. DAVIS:

13           Q.       So there's a couple points of the policy  
14 I want to highlight and just ask if you believe this  
15 is -- if you're in agreement with the  
16 proportionality standard and the Whitley factor.

17                   First, this highlighted language here,  
18 "The use of force is restricted to instances of  
19 justifiable self-defense, protection of others,  
20 protection of property, prevention of escapes, and  
21 to maintain or regain control, and then only as a  
22 last resort and in accordance with the appropriate  
23 statutory authority."

24                   Do you believe that language is  
25 consistent with the proportionality standard?

1           A.       Except for proportionality I don't  
2 believe it is addressed in that statement.

3           Q.       I will continue on. Also language here,  
4 "Force will not be used for vindictive or  
5 retaliatory purposes. The use of force is never  
6 justifiable as punishment."

7                    Again do you see that as being  
8 consistent with the Whitley factors?

9           A.       It's not specifically mentioned in  
10 Whitley, but that is my understanding. It's part of  
11 the constitutional requirements of reasonable force  
12 or appropriate force, that it's never used for  
13 punishment or vindictive or retaliatory purposes.

14                   And that language is common throughout  
15 the corrections industry, excuse me, as is that  
16 first paragraph that we reviewed, with the exception  
17 of the piece that I mentioned. Most agencies have a  
18 phrase or clause that speaks to not only as a last  
19 resort, excuse me, but the minimum amount necessary  
20 to regain control or words to that effect.

21           Q.       Okay. So I'm going to move down to  
22 another section of the policy here. We're on page 7  
23 of the policy now under III. And this states,  
24 "Non-force methods of control should be used  
25 whenever possible and the minimum necessary force

1 should be used to gain control only when non-force  
2 methods have failed or are not appropriate."

3 Sorry. One more I want to highlight  
4 here. "Only the amount of force that is reasonably  
5 necessary to overcome resistance, mitigate an  
6 incident, or gain control under the circumstances,  
7 is permissible."

8 Do you feel that this highlighted  
9 language incorporates the proportionality standard?

10 A. It does.

11 MR. DAVIS: I'm going to turn to the  
12 canine policy now.

13 Okay. Sorry for the delay there.

14 Madam Court Reporter, I would like to  
15 make this our Number 5.

16 (Defendants' Exhibit 5 was marked for  
17 identification.)

18 BY MR. DAVIS:

19 Q. And, Mr. Hurley, this is the VDOC canine  
20 policy, correct?

21 A. Correct.

22 Q. Okay. I'm going to highlight some  
23 language here. It says, "While one of the greatest  
24 values of canine teams lies in the deterrence effect  
25 of their presence, their use is authorized only when



1 the circumstances justify such use.

2 "The Canine Officer should be constantly  
3 aware that a Corrections Officer may use only the  
4 amount of force necessary to maintain control, and  
5 that the use of canine under such circumstances  
6 constitutes the use of force or the implied use of  
7 force.

8 "In determining the amount/type of force  
9 to be used, the Canine Officer should take into  
10 consideration all circumstances known to them."

11 Do you feel that this also incorporates  
12 the proportionality standard?

13 A. I do not.

14 Q. Could you elaborate?

15 A. There is no guidance here to explain  
16 when the use of that high-level type of force would  
17 be justified.

18 Q. So your testimony is that you think  
19 additional restrictions should be explicit in the  
20 policy for it to be proportional?

21 A. Yes.

22 Q. If I could move on now to the next  
23 section, the heading is VDOC's Use of Force Policies  
24 Are Not In Line With National Correctional Stances  
25 Regarding Constitutional K-9 Use. This is page 9 of

1 the report. Do you see that section, sir?

2 A. Yes, I do.

3 Q. So the first subheading under there,  
4 Canine Use Of Force In The Confinement Setting Is  
5 Rare. You cite to an article by Human Rights Watch  
6 for the proposition that the use of canines as an  
7 instrument of force in confinement settings is the  
8 exception to correctional practice and not the rule.  
9 And you further state that "...the few jurisdictions  
10 that used canines to maintain order and secure  
11 prisoner compliance most typically used them for  
12 cell extractions..."

13 I'd like to pull up that article.

14 A. Sure. Excuse me.

15 Q. I'll scroll down to the title here.  
16 Mr. Hurley, is this the article cited in your  
17 report?

18 A. I believe it is.

19 MR. DAVIS: Madam Court Reporter, I'd  
20 like to make this our Number 6.

21 (Defendants' Exhibit 6 was marked for  
22 identification.)

23 BY MR. DAVIS:

24 Q. So, Mr. Hurley, do you recall where in  
25 this article it discusses how many state

1 correctional systems use canines for purposes other  
2 than cell extractions?

3 A. I don't recall that as we sit here.

4 Q. Let me -- I'll start with the summary  
5 and if you want to read that. Let me know when you  
6 need me to scroll down.

7 A. Okay. Okay.

8 Q. (Scrolling.)

9 A. Sure.

10 Q. All right. I'm going to move down now  
11 to page 11 of the article. Let me know when you  
12 would like me to continue scrolling here.

13 A. Okay.

14 Q. (Scrolling.)

15 A. Stop. You're going to have to scroll  
16 up.

17 Q. Oh. Sorry about that.

18 A. It's been a while since I've had my  
19 Evelyn Wood speed reading course.

20 Okay.

21 Q. (Scrolling.)

22 A. Okay.

23 Q. (Scrolling.)

24 A. Okay.

25 Q. (Scrolling.)

1           A.     Stop, please. Can you back up just a  
2 little, please?

3           Q.     Oh. My apologies.

4           A.     Okay.

5           Q.     (Scrolling.)

6           A.     Go ahead.

7           Q.     (Scrolling.)

8           A.     Stop, please.

9                 Okay. Down a little more.

10          Q.     (Scrolling.)

11          A.     And stop.

12                 Okay. Go on down to the next page.

13          Q.     (Scrolling.)

14          A.     And stop. Okay.

15          Q.     (Scrolling.)

16          A.     Okay.

17          Q.     (Scrolling.)

18          A.     Okay. Go ahead. Sorry.

19          Q.     Okay. And that's the end of that  
20 portion.

21                 So is it fair to say that this article  
22 focuses on these seven states and their use of dogs  
23 for the purpose of cell extractions?

24          A.     I didn't take the article that way, that  
25 they were only to be focused on cell extractions,

1 although that certainly is the highlight of that,  
2 because it speaks to some commissioner saying the  
3 dog won't be brought onto the unit at all without  
4 the commissioner's approval, reaching out to former  
5 directors or high-level corrections officials to get  
6 their opinions about the use of canines. So I took  
7 the article to represent overall use of canines in a  
8 correctional setting and for what purposes.

9 Q. Okay. So then do you take the article  
10 to state that only those states listed in the  
11 article use canines as a force vehicle?

12 A. No, I didn't take it to read that way.  
13 And I can't quote the entire -- I tried to quote  
14 parts of it and then break that down into of those  
15 that they mentioned using cell extractions how many  
16 were left. I think it came down to two, and they  
17 rarely used those. But I believe it also spoke to  
18 -- I did reread the article this morning -- that  
19 maybe 37 states had canine units for use and many of  
20 those were used for escape apprehension, drug  
21 detection, searches, those kind of things, but  
22 again, yes, there was a heavy concentration on cell  
23 extraction.

24 Q. And your reference to 37 states that use  
25 canines for some purpose, is that anywhere in your

1 report?

2 A. I don't recall. And, again, that's my  
3 recollection of that. I'd have to read it again to  
4 be absolutely certain.

5 Q. Can you testify at this time to the  
6 number of states that use canines for force  
7 purposes?

8 MR. JOHNSON: Object to form. You can  
9 answer if you know, Mr. Hurley.

10 A. I don't know. And I researched trying  
11 to find anything that would indicate that or  
12 summarize that, and I was not able to find any  
13 research that established that number. So, no, I  
14 can't.

15 BY MR. DAVIS:

16 Q. And you also -- I'm turning to page 10  
17 of your report. You refer to the fact that  
18 Immigration and Customs enforcement doesn't use  
19 canines for force, control or intimidation of  
20 detainees.

21 In the materials that you reviewed or  
22 from your consulting experience do you understand  
23 the reason for why they don't use canines for ICE  
24 detention?

25 A. The methods they currently have to

1 resolve disturbances are sufficient. No, I don't  
2 have direct knowledge of their rationale for that,  
3 but it aligns with what I'm aware of as generally  
4 accepted correctional practice. And that also  
5 aligns I believe with Mr. McCowan's testimony that  
6 he was not aware of any other correctional system  
7 that used canines for control purposes.

8 Q. And do you know whether Officer McCowan  
9 is in a position to know the practices of other  
10 state correctional systems?

11 A. I do not know that, but in general  
12 specialty units and assets like that tend to be very  
13 interested in their specialty. So, for instance,  
14 special tactics units, they have a strong interest  
15 in that, and my experience is they usually know what  
16 their sister states are doing or what other places  
17 are doing. It's not out of the realm of  
18 possibility. I can't say that he would.

19 Q. Turning back to the question about ICE  
20 detention, are the people who are detained by  
21 Immigration and Customs Enforcement -- is that  
22 population people who are currently serving  
23 sentences for criminal convictions?

24 A. Technically, no, but some of them are  
25 maximum-security detainees who are back in an ICE

1 detention facility after serving significant time at  
2 a state correctional facility for violent crimes.  
3 So they're not necessarily all minimum-security  
4 detainees.

5 Q. Do you know what share of the detainee  
6 population the maximum-security individuals are?

7 A. I do not. I do know that some  
8 facilities have a significant portion of their  
9 population that falls in that category, but I can't  
10 give you that statistic.

11 Q. So I'm going to move on to your next  
12 section here titled At A Minimum, The Correctional  
13 Industry Recognizes Canine Use Of Force Should Be  
14 Limited To Situations Involving Imminent Risk Of  
15 Severe Bodily Harm Or Death.

16 A. What page are you on?

17 Q. This is page 10 of your report.

18 A. All right. Okay.

19 Q. You state, "General use of force  
20 incidents like inmate-on-inmate fights rarely, if at  
21 all, justify the types of injuries caused by  
22 canines..."

23 Is there a particular source or basis  
24 for that statement, any policy or industry standard  
25 that you're referring to?



1           A.       Other than force is not to be used to  
2       inflict unnecessary pain or proportionality.

3           Q.       Do you have any statistics or  
4       information regarding the rate of serious injury  
5       that can be caused by inmate-on-inmate fights?

6                   MR. JOHNSON: Object to the form. You  
7       can answer if you know, Mr. Hurley.

8           A.       I do not, but I know that's something  
9       that is tracked.

10                   I'm going to answer that question this  
11       way: I'm committed to confidentiality clauses in  
12       most of the work I do, so I can say in the  
13       monitoring process and in the DHS process some of  
14       that involves knowing what the injuries were related  
15       to a fight or the use-of-force portion of that,  
16       whether the inmate's injuries were caused by the  
17       fight or caused by the use of force, or whether  
18       those injuries are consistent with the force, if it  
19       was necessary, the types of methods that were used.

20                   Throughout my career I've used that. I  
21       see that used by many agencies. I know there are  
22       some elaborate data systems to assess that. I can  
23       say that if you did look at our monitor's report for  
24       the Nunez consent judgment there would be graphs and  
25       statistics in there and pages dedicated to that type

1 of issue, both inmate-on-inmate fights and  
2 inmate-on-staff, and use of force, and  
3 differentiating the level of injuries and the cause  
4 of injury.

5 BY MR. DAVIS:

6 Q. Understood. And just to clarify,  
7 certainly I don't want you to feel like I'm asking  
8 you to disclose any sort of protected or  
9 confidential information during our time today.

10 A. I will say the American Correctional  
11 Association in their performance-based standards  
12 have assessments they use related to issues like  
13 that, and they also look at medical reports to see  
14 how many injuries the medical department assesses  
15 and the source of those injuries. So it comes  
16 through several different channels.

17 Q. Did you consider any of that information  
18 in drafting your report?

19 A. Well, globally, just speaking about  
20 proportionality, but looking at the Johnson case  
21 just on what was available to me and what I  
22 received. I just considered the event as it  
23 happened to Mr. Johnson.

24 Q. Understood. Further down that page you  
25 state, "Canine deployment must be very high on the

1 use of force continuum because of the potential and  
2 high likelihood of severe injury to the subject.  
3 The precautions used in K-9 and K-9 Handler training  
4 confirm these concerns. The training is extensive,  
5 lengthy, and strictly controlled."

6 Are you referring in that excerpt there  
7 to the DOC canine training or general standards?

8 A. Both, although I'm critical of their  
9 training later, but in terms of the length of their  
10 training, certainly lengthy, the duration of it,  
11 they did have some things where they're referring to  
12 strictly controlled. They did have a lot of detail  
13 regarding what the decoy should do or what  
14 protective gear the decoy should wear and  
15 precautions to avoid unnecessary bites and  
16 accidental bites. So that portion of their training  
17 acknowledges and recognizes the risk of injuries  
18 that a canine can produce.

19 Q. Now, referring to the extensive and  
20 lengthy nature of canine training, do you just  
21 attribute that to the potential injuries and level  
22 of force that are involved?

23 A. No, I do not.

24 Q. What else would you consider there?

25 A. I would consider the things in the

1 standards that the defense expert referenced and  
2 some of the things that are mentioned in VADOC  
3 canine training curriculum. My problem with it, as  
4 I said in the rebuttal report, was they really  
5 didn't have any details of terms for certain  
6 factors, such as what is excessive force, what is  
7 proportionality, cognitive bias, and/or normal human  
8 reactions to a canine.

9 Q. Thank you.

10 You excerpt from Mr. Burwell's report  
11 regarding the nature of injuries that could be  
12 potentially caused by a canine. Do you agree with  
13 his assessment that dog bites are more severe than  
14 injuries from a taser?

15 A. Yes.

16 Q. Could you elaborate on that?

17 A. Part of my responsibilities for the  
18 Nunez consent judgment was to review training  
19 curriculum such as use of force. The Taser X2 was  
20 part of that. And I observed the delivery of that  
21 training. So in that training and in the materials  
22 the -- there are some concerns about inducing  
23 seizures. There is controversy about potential  
24 heart capture it's called, capturing the rhythm of  
25 the heart, and maybe having serious problems there.

1 So there's precautions about taser placement, but  
2 for the most part they really talk about how to  
3 remove the probe safely and treat it with an alcohol  
4 swab or something and have the medical staff check  
5 the person. But in general the likely injury that a  
6 person suffers from that is two pin pricks, so to  
7 speak, small red spots on their body. So you're not  
8 talking about torn skin, broken bones, ripped flesh,  
9 or destroyed nerves, those kind of things. So if I  
10 -- I would rather be shot with a taser than bitten  
11 by a canine.

12 Q. Would you know what the rate of fatality  
13 or lethal injury is from a taser versus from a dog  
14 bite?

15 MR. JOHNSON: Object to form. You can  
16 answer if you know, Mr. Hurley.

17 A. I don't know. I've researched the area  
18 related to in-custody death related to restraint  
19 methods, but not specific to canine.

20 BY MR. DAVIS:

21 Q. Okay. Let me ask as well about  
22 Mr. Burwell's statement that a dog bite can be more  
23 serious than a gunshot. Do you agree with that  
24 assessment?

25 A. I'm going to defer to his expertise in

1 terms of, you know, seeing more of those things than  
2 I would have ever seen. But also I have looked at  
3 some research articles related to emergency room  
4 physicians or different experts in the canine field  
5 of the types of injuries that canines can produce.

6 Q. Okay. But in your experience is a  
7 gunshot a more-likely-to-be-lethal use of force than  
8 a dog bite?

9 A. I would not necessarily agree with that  
10 because people do survive gunshots. It depends on  
11 where you shoot the person. And it's in my training  
12 related to gangs and things. I've watched a lot of  
13 videos where -- either actual footage or  
14 reenactments where suspects were shot multiple times  
15 and didn't die and still assaulted the police. And  
16 then I've seen, as I include in my reports, cases  
17 where a canine was engaged in lethal behavior and  
18 the handler himself, the police officer, had to  
19 shoot the canine to save their life.

20 So -- and the handlers in this case even  
21 spoke about, you know, it could be lethal -- like  
22 any use of force can be lethal if it's not used  
23 properly. And that's why they guide the dog to bite  
24 certain parts of the body, to avoid biting a person  
25 on the neck or the head or areas that could be

1 fatal.

2 Q. So I'll ask again the same question I  
3 asked regarding tasers. Do you know any statistical  
4 information about the relative lethality of a  
5 gunshot versus that of a dog bite?

6 MR. JOHNSON: Object to form.  
7 Mr. Hurley, you can answer if you know.

8 A. Yeah. I do not.

9 BY MR. DAVIS:

10 Q. Okay. So further down, on page 11 of  
11 your report, you excerpt from the -- I guess the  
12 journal Academic Emergency Medicine an article that  
13 they wrote about dog-bite injuries.

14 Did you review Mr. Johnson's medical  
15 records in this case?

16 A. I don't recall as we sit here.

17 Q. Do you recall whether any of the  
18 injuries he sustained correspond with the injuries  
19 listed in this excerpt here?

20 A. I do not recall.

21 Q. Turning to page 12, you cite to an  
22 article authored by Peter Meade and the source is  
23 Science Direct. In the first bolded language in  
24 that excerpt you state, "We also observed that  
25 police dog bites tended towards higher numbers of

1 bites in the central areas of the body: the head,  
2 the upper arms, and chest."

3 From your review of the evidence was  
4 Mr. Johnson bitten in any of these areas?

5 A. He was not, but it did appear to me on  
6 the video shortly after Officer McCowan entered the  
7 pod the canine leapt high, very high, at  
8 Mr. Johnson, and it appeared to me that the canine's  
9 head was at Mr. Johnson's head level or right in  
10 that area.

11 Q. And did you see from the evidence  
12 whether the dog actually connected on a bite when it  
13 hit -- it moved in that direction?

14 A. I couldn't see like a bite and hold, but  
15 I also could not tell if, you know, the teeth were  
16 engaged on Mr. Johnson's body. The video is not  
17 clear enough for me to be able to make that  
18 determination.

19 Q. Do you know whether Mr. Johnson claimed  
20 that the dog had connected?

21 A. I don't recall that, but I do recall  
22 something related to an abrasion or a bump on his  
23 head or something to that nature.

24 Q. Did he attribute that to the dog?

25 A. I don't recall him attributing that to



1 the dog.

2 Q. I'm turning to page 13 of your report.  
3 You quote Officer McCowan as -- or cite to his  
4 testimony on the footnote 12 on the accompanying  
5 text. You state that, "The VDOC K-9 Handlers'  
6 expectations of what the offender had to do to be in  
7 compliance - face down with arms out and palms up,  
8 or with hands on the back of the head with legs  
9 crossed..."

10 I want to pull up Officer McCowan's  
11 deposition transcript.

12 A. Okay.

13 Q. Can you see this, Mr. Hurley?

14 A. You may have to enlarge that if you  
15 could.

16 Q. How about now?

17 A. One more time.

18 Okay. Thank you.

19 MR. DAVIS: All right. So you cite to  
20 page 77. Just if you want to read that I'll scroll  
21 down and give you -- and, Madam Court Reporter,  
22 let's make this Defendants' Number 7.

23 (Defendants' Exhibit 7 was marked for  
24 identification.)

25 THE DEPONENT: Okay. Scroll down just a

1 little bit, please.

2 MR. DAVIS: (Scrolling.)

3 THE DEPONENT: Okay. Stop.

4 BY MR. DAVIS:

5 Q. Are you finished reading that?

6 A. Yes.

7 Q. I'm going to go down to 185 is the other  
8 page you cited in support of that statement.

9 A. Yes. If you could scroll back up just a  
10 little.

11 Q. (Scrolling.)

12 A. And back up just a little.

13 Q. (Scrolling.)

14 A. Okay.

15 Q. So just in those excerpts there wasn't  
16 any testimony there about requiring hands to the  
17 back of the head, correct?

18 A. Correct, but if you could pull that back  
19 up.

20 Q. Sure.

21 A. Okay.

22 Q. Is there anywhere else you can recall in  
23 that testimony that that requirement of compliance  
24 was testified to?

25 A. No, I do not. It is possible that I

1 misread that for looking at other depositions -- you  
2 know, included that and that did make a reference.

3 Q. Okay.

4 A. I'll also say that usually when people  
5 are asking the subject to be with legs crossed  
6 that's usually in a kneeling position with their  
7 hands still on the back of their head. That's a  
8 very common surrender position somebody puts the  
9 person in, so...

10 Q. Understood. Immediately after that text  
11 you state that Mr. Johnson sustained injuries to  
12 several parts of his body. Are you testifying that  
13 he was bitten anywhere other than the right wrist or  
14 forearm area?

15 A. No, but, again, I don't recall the exact  
16 locations of the injuries at this point.

17 Q. Okay.

18 A. Yes. I mean, those two areas.

19 Q. Further down that page you state, "By  
20 comparison, to achieve certification for other use  
21 of force devices, the officer has to be subjected to  
22 the impact of the device."

23 What are you -- are you basing that  
24 statement on?

25 A. My training, the training I observed in

1 different facilities, policies that I've seen. So,  
2 for instance, I mentioned the OC spray. That's  
3 pretty standard, where a person has to be subjected  
4 to the agent to become certified in the use of that  
5 agent. A taser is one of those other items that the  
6 person that's subjected to the effects of the taser  
7 becomes certified to carry a taser.

8 Q. Do you know if an officer is expected to  
9 be subjected to being hit with impact munitions  
10 before he can use those?

11 A. No, not that I'm aware of.

12 Q. Okay.

13 A. But I think I also make that point in my  
14 report in that same paragraph. I say, "There is a  
15 reason officers are not subjected to the impact of a  
16 bullet or some 'less lethal' devices; the risk of  
17 death or serious injury is too great."

18 So the beanbag rounds, rubber bullets,  
19 those kind of things, would be what I'm talking  
20 about there. I wasn't trying to say they have to be  
21 subjected to everything.

22 Q. So would you consider an impact round to  
23 be comparable at a level of force for a canine?

24 A. Comparable or just below the canine.

25 Q. Were you asking me that or --

1           A.     No. I'm saying that.

2           Q.     Okay. And officers who are training  
3 with a canine, they may wear some protective  
4 equipment, but they do assume the possibility that  
5 they could be bitten somewhere other than the part  
6 of the body that the equipment is covering. Is that  
7 fair to say?

8           A.     That is fair to say.

9           Q.     The last three paragraphs on this page  
10 13 -- it begins with a statement, "There is no K-9  
11 handler, trainer, corrections officer... that I  
12 know, who would ever lie on the ground and subject  
13 themselves to the risk of injury these dogs can  
14 inflict." And that continues on to the bottom of  
15 the page.

16                   Is there a source for this excerpt aside  
17 from your individual personal experience of being  
18 near a canine in a demonstration?

19           A.     Other than knowing those handlers. For  
20 instance, a highway patroller, or that particular  
21 handler. And I meant to say without the protective  
22 gear.

23           Q.     Okay.

24           A.     That's a key phrase I missed. But I  
25 don't know anybody that would without any protective

1 gear subject themselves to the risk associated with  
2 a canine under a bite-and-hold command.

3 Q. And you had testified before that the  
4 patrol canines were not used in your agency during  
5 your time in corrections; is that correct?

6 A. That's correct. We --

7 Q. At what -- oh, I'm sorry. Go ahead.

8 A. We did use canines for the search  
9 purposes. So we would conduct a facility search we  
10 did introduce canines into the search process and/or  
11 search of visitor and employee property when they  
12 came into the facility and the search of cars in the  
13 parking lot for drug interdiction purposes. I have  
14 also authorized and used canines for escape,  
15 apprehension, or pursuit purposes.

16 Q. And so was it one of those dogs that was  
17 the demonstration that you referred to here?

18 A. Correct.

19 Q. I'm turning now to page 14. You cite to  
20 the International Association of Chiefs of Police as  
21 stating that they stressed that canines should be  
22 kept on a lead when tracking suspects to maintain  
23 control and reduce bites, and that canines should  
24 not be used for routine calls or crowd control.

25 Was the dog in this incident involving

1 Mr. Johnson -- was it ever taken off lead?

2 A. No, not that I'm aware of.

3 Q. Did the source that you cited, the  
4 limitation on using canines for routine calls and  
5 crowd control, did it specify whether that was in  
6 the context of community police or was that extended  
7 to a correctional setting?

8 A. Most likely the context of community  
9 policing.

10 Q. So after that text there is an excerpt  
11 here from one of the monitor's reports from the  
12 Nunez case. Do you know what industry or legal  
13 standards the monitor was relying on when they  
14 reviewed the canine policies?

15 A. Probably those case laws that I  
16 referenced earlier in my report, Graham versus  
17 Connor or Whitley. And I, again, didn't necessarily  
18 share that or cite that with -- with me or the rest  
19 of the team.

20 Q. Okay. What was the -- what was the  
21 monitor's directive here in reviewing the policies?  
22 Was it to implement best practices? Was it just to  
23 reach a constitutional minimum?

24 A. None of the things that we do associated  
25 with the consent judgment or monitoring is to drive

1     towards best practice. That's outside the scope of  
2     what we're charged with doing. And it's my  
3     understanding that the court is always striving to  
4     have the least amount of -- interference is probably  
5     not the right word, but just looking for the most  
6     reasonable, least restrictive alternative to  
7     practice to achieve constitutional conditions, only  
8     that which is absolutely necessary.

9                     And I know I'm not saying that in proper  
10    legal terms. Those are layman's term. You know,  
11    I'd have to look up that language, but that's the  
12    intent.

13                    Q.     Okay. Is the Nunez consent decree --  
14    and they've had various changes that were  
15    implemented from that. Do you know if that's  
16    considered an industry standard by other agencies?

17                    A.     No, I do not.

18                    Q.     And I believe you testified to this  
19    earlier, but following this report from the monitor  
20    was there a final policy that was approved and  
21    implemented?

22                    A.     Yes, I believe so. There was already an  
23    existing policy that was being modified to account  
24    for concerns and to try to limit the use of canines  
25    in conditions where serious bodily injury or death



1 were evident or imminent.

2 Q. Was -- did you review the final  
3 modifications?

4 A. Most likely, but we reviewed those  
5 policies several times, three or four times, during  
6 the revision process. So for me to be able to sit  
7 here to say with confidence absolutely I did that, I  
8 cannot do that, but --

9 Q. Okay.

10 A. -- most likely.

11 Q. And it cites to -- or it includes the  
12 standard in here on SBI, imminent and immediate  
13 threat of serious bodily injury or death. Is there  
14 a particular threshold or standard that was used  
15 here for determining a level of threat that would --  
16 that would be at that level, I guess?

17 A. I can't recall a specific standard, but  
18 I know that we've had discussions about conditions,  
19 and many of those being associated with escape  
20 apprehension or a true riot where there's of control  
21 of the facility or a unit, where weapons were being  
22 used, serious injuries were occurring, and all their  
23 methods were not effective or available, and where  
24 it was obvious that somebody may die or may be  
25 permanently injured, but it was necessary for

1 protection from harm and saving lives to intervene.

2 MR. DAVIS: Okay. Can we go off the  
3 record?

4 (Off-the-record discussion)

5 (Recess from 11:54 a.m. to 1:00 p.m.)

6 BY MR. DAVIS:

7 Q. Mr. Hurley, I want to ask you now about  
8 subsection C, entitled VDOC's Policies On Use Of  
9 Canines As An Instrumentality Of Force Are Outliers  
10 On When Canines May Be Used. This is beginning on  
11 page 15.

12 A. Okay.

13 Q. In the first sentence of that section  
14 you state, "The use of K-9s for routine use of force  
15 events in correctional settings is so rare that VDOC  
16 is the exception rather than the rule."

17 Could you explain that statement? Have  
18 you reviewed policies or practices in other  
19 correctional agencies about when canines are used?

20 A. I'm not aware of correctional agencies  
21 using canines very often. The ones that I found  
22 restrict it to certain types of things, such as  
23 escape apprehension, drug interdiction, or imminent  
24 danger of death or serious injuries.

25 Q. What states did you look at?

1           A.       Well, when I worked with Department of  
2       Homeland Security I looked at the use-of-force  
3       policies associated with theirs, New York, Ohio  
4       certainly. I reviewed Indiana, but not recently.  
5       They did use canines at one point. I believe  
6       Pennsylvania, but again not in recent history.

7           Q.       Any others?

8           A.       In some of the cases that I've handled  
9       for civil matters, reviewed those use-of-force case  
10      -- or policies. But, you know, to specify which  
11      states and which policy, you know, I can't sit here  
12      and say other than those that I mentioned.

13          Q.       Okay.

14          A.       But I know I had a use-of-force case in  
15      Maine, Louisiana prison parishes, Colorado,  
16      Wisconsin, Oklahoma, and then Homeland Security  
17      would be California, New Mexico, Arizona, Florida --

18          Q.       When you --

19          A.       -- Pennsylvania.

20          Q.       Excuse me, Mr. Hurley. I'm sorry to  
21      interrupt there, but when you were just referring  
22      to, I think, the Colorado -- or California, Arizona,  
23      a few others, that list there, you said those were  
24      Homeland Security policies?

25          A.       Those -- yes. Starting with California

1 and the rest that I named, yes.

2 Q. Okay. So those are federal guidelines  
3 and those are just the locations that --

4 A. Each facility has their own use-of-force  
5 policy.

6 Q. Now, are those ICE facilities?

7 A. Yes.

8 Q. Okay. And the list you gave earlier of  
9 Maine, and I think you said Louisiana, Colorado,  
10 Wisconsin, and Oklahoma -- did you say those are  
11 ones you reviewed for case testimony?

12 A. Yes.

13 Q. Okay. And of those states you listed  
14 none of them -- your testimony is none of them  
15 permit canines except in specific circumstances?

16 A. That's correct, but, again, it's been  
17 years since I reviewed the Indiana policy or  
18 Pennsylvania. So best as I can recall.

19 Q. And you continue on to some discussion  
20 about VDOC's use-of-force policy and the force  
21 continuum. In your experience do other correctional  
22 agencies have a hierarchy of force that requires  
23 certain levels of force to be exhausted before an  
24 officer can move on to the next step up?

25 A. Not completely.

1 Q. Could you explain?

2 A. Most use-of-force policies allow the  
3 officers to escalate to higher levels of force  
4 options depending on the conditions they're  
5 confronted with, but in general the policies speak  
6 to start with verbal commands or deescalation  
7 attempts, and then usually it's things such as soft  
8 -- what they call soft-hand techniques or OC spray.  
9 You know, there's not consistency in the industry of  
10 which comes first. Sometimes they'll advocate for  
11 the use of OC spray versus doing hands-on. I  
12 understand that. I don't have a problem with those  
13 two things being interchangeable. But then when  
14 they get into devices or instruments that may cause  
15 serious injury or the potential for serious injury  
16 or for death they are higher on the use-of-force  
17 continuum and usually there's more specific  
18 requirements of conditions that should be met if an  
19 officer chooses to use those.

20 So, for instance, a person in custody  
21 just refusing to move or verbally swearing at a  
22 staff member does not justify the use of a baton, so  
23 to speak, to strike the person in custody. If a  
24 person is old, sick, and weak, and can be controlled  
25 with soft-hand techniques, that has to be taken into

1 consideration. So, therefore, again the use of a  
2 taser, a baton, canine, would not be appropriate for  
3 somebody who is feeble because they can be  
4 controlled through other methods that are more  
5 proportionate with the type of threat they might  
6 impose.

7 Q. Do these policies spell out the  
8 circumstances when a particular -- excuse me -- a  
9 particular level of force is allowed?

10 A. Well, without violating my  
11 confidentiality cause --

12 Q. Sure.

13 A. -- I'll just speak in general of a major  
14 metropolitan use-of-force policy that does give  
15 specifics. It differentiates between types of  
16 resistance.

17 Passive-resistance things might be  
18 somebody just standing there refusing to move or  
19 they might be verbally saying -- you know, swearing  
20 at the officer or staff or saying "I'm not going to  
21 do it" or sitting down refusing to move. Those  
22 kinds of things fall under the category of passive  
23 resistance. And so then they talk about it would be  
24 appropriate for the officer to try to talk to the  
25 person or just use their hands to try to lift the

1 person up and guide them where they want them to go.

2 Active resistance then is described as  
3 somebody that may try to walk away from the officer  
4 or hold onto a door handle or hold onto a pole and  
5 do active things to keep themselves from being  
6 moved, but is not considered to be a direct threat  
7 to the officer for injury or death because the  
8 actions are just directed at resisting being  
9 restrained or resisting being moved, but not  
10 aggressive or assaultive actions.

11 Then the next level would be aggressive  
12 resistance where the offender is trying to punch the  
13 officer or making moves consistent with those kind  
14 of things, combined with other types of threat.  
15 They can get into lethal or deadly-force instances  
16 where they have a weapon, they are attacking  
17 somebody, they're using the weapon, injuries are  
18 occurring, those kinds of things.

19 So then they give examples in each of  
20 those categories of the types of options in the  
21 use-of-force continuum that would be appropriate for  
22 responding to that type of resistance. And if it's  
23 not in a policy necessarily then where they teach  
24 the policy and teach defensive tactics they give  
25 examples and go over those kinds of things. And

1 they may have examples of what a reasonable officer  
2 would do when confronted with this type of  
3 situation.

4 So I've conducted and seen other  
5 agencies do that type of thing, where they'll have  
6 simulated guns, simulated knives. And really they  
7 talk about, well, this is a 70-year-old guy that's  
8 five-foot-three and 90 pounds who does have a knife  
9 but you're 40 feet away from them, can you use  
10 deadly force? And the answer is no, given the  
11 parameters of this situation.

12 So they go over those kinds of things  
13 and explain why it is or isn't, or they use video  
14 from actual events and they present those to the  
15 class, and they will stop it perhaps and say, "At  
16 this point what's the good decision? What are  
17 acceptable decisions?" And there's different ways  
18 to put that out.

19 So the concept of the policy is tied to  
20 real events with real examples to help reinforce  
21 what is considered reasonable force for the types of  
22 things the officers encounter on a daily basis.

23 Q. Okay. So you mentioned just now one  
24 example of a policy that was a little more  
25 structured, about what the parameters would be for



1 different steps of escalation of force, and you also  
2 mentioned some training that just sets out scenarios  
3 where that might be put into practice.

4 The policy that you referred to, do you  
5 know, is that typical for the use-of-force policies  
6 that are in other agencies or is there more variety?

7 A. There's variety. A lot of them have  
8 that boilerplate language I call it where the phrase  
9 of using the minimum amount of force necessary to  
10 regain control or protect someone from harm or  
11 protect another or stop an escape -- that language  
12 is in almost all use-of-force policies. And there's  
13 also the phrase that, no, you don't have to go  
14 through the entire continuum step by step. It's  
15 understood. But it's also understood that if you  
16 have a person at the passive-resistance level you're  
17 not going to necessarily hit them with a baton or  
18 use an instrument of force that's going to cause  
19 significant injury based upon their behavior that  
20 you're confronted with.

21 Q. And you say that that's understood.  
22 Does that mean that it's there in the face of the  
23 policy?

24 A. I can't say that -- to that specific  
25 example that I gave it's in the face of the

1 policies. No, I cannot say that.

2 Q. Okay. And you on that same page take  
3 issue with the -- that the DOC use-of-force policy  
4 doesn't speak directly to canine deployment, and you  
5 compare it to the provisions in there on chemical  
6 agents. So I kind of want to talk about that  
7 segment of your report here.

8 Now, first, there is a separate policy  
9 that VDOC uses for use of canines, correct?

10 A. There is.

11 Q. And that policy incorporates the general  
12 use-of-force principles into it; is that fair to  
13 say?

14 A. I have to look back at that canine  
15 policy.

16 I'll say yes without reviewing it for  
17 the moment --

18 Q. Okay.

19 A. -- the general use-of-force principles.

20 Q. Now, the excerpt that you have from the  
21 policy about -- here where it refers to the use of  
22 OC spray -- these provisions in here -- just to be  
23 clear, it looks like these were amended and added  
24 after the incident with Mr. Johnson, correct?

25 A. That may be correct. I think I received

1 different versions of the policy, revised or not.  
2 So if this comes from a later version, understood.

3 Q. Sure. So just looking at -- you know,  
4 at the direct quote in here, it says there in  
5 parentheses changed May 1st, '21.

6 A. Yes.

7 Q. And that is -- I'll just -- I'll  
8 withdraw that question.

9 Let me ask you, do you believe that the  
10 use of OC spray in this incident was appropriate?

11 A. Yes.

12 Q. Okay. Now, the policy here contemplates  
13 at least some circumstances where there would be a  
14 need for prior authorization before using OC spray,  
15 correct?

16 A. Correct.

17 Q. Was there prior authorization here?

18 A. Not that I'm aware of.

19 Q. So the exception to the need for  
20 authorization and this language here on page 15  
21 states, "Except when there is immediate danger of  
22 physical violence toward other persons by an  
23 offender inmate or probationer/parolee..."

24 Would you -- given that you had  
25 testified that you believe the use of OC was

1 appropriate in this instance, would you believe at  
2 the time it was used there was an immediate danger  
3 of physical violence that justified the use of it?

4 A. I do.

5 Q. Okay. Now, the policy language here on  
6 chemical agents also includes some provisions about  
7 pre-clearing for medical conditions; is that  
8 correct?

9 A. That's correct.

10 Q. And it states in there that you check  
11 for medical restrictions if time permits, correct?

12 A. Correct.

13 Q. So in an ongoing-fight situation would  
14 that be something that would permit time to do such  
15 a review?

16 A. The key word there is "ongoing," an  
17 active fight. So time did not permit for a medical  
18 check, or contraindications as it's referred to,  
19 when Mr. Guy attacked Mr. Johnson, while Mr. Johnson  
20 was defending himself or engaging in a fight. They  
21 didn't have time to call the medical department. I  
22 understand that. And those are common practices in  
23 the correctional industry, and it's also common  
24 practice to add these types of precautions  
25 associated with tasers, associated with electronic

1 immobilization devices, or chemical agents. So --

2 Q. And what would be the reason for  
3 reviewing for contraindications, for checking for --  
4 for a medical condition?

5 A. Because if that use-of-force option  
6 creates a serious medical concern, then the security  
7 staff have to try to figure out a different option  
8 to control the situation or deal with an offender  
9 when possible.

10 Q. So, to your knowledge, what sorts of  
11 medical conditions might, you know, exacerbate the  
12 concern from using chemical agents or from using  
13 electronic equipment?

14 A. It could be seizures. It could be  
15 asthma. It could be heart conditions. You know,  
16 it's never been my job to know and determine all the  
17 medical conditions that are contraindications.  
18 That's what the medical staff are there for. It's  
19 their job just to tell the security staff, "We don't  
20 support the use of that option; figure out a  
21 different option" or "These are the types of options  
22 that don't present a medical contraindication."

23 Q. Now, would there be any sort of similar  
24 preexisting medical condition that would exacerbate  
25 the effect of a dog bite in a way similar to the

1 ones that you just explained here could exacerbate  
2 the effect of chemicals or a taser?

3 A. Again, I'm not a doctor or a nurse, and  
4 I would defer to them. As a layman, I would think  
5 folks with heart conditions or trauma issues that --  
6 or mental health issues, their inability to  
7 understand what's going on, could escalate the  
8 situation. So given those considerations that a  
9 licensed professional might make, I could see where  
10 they could say a dog is contraindicated.

11 Q. Okay. Now, on subsection (g), which  
12 also includes some language highlighted there, that  
13 states, "In a contained area to compel an offender  
14 inmate or a probationer/parolee to comply with  
15 direct orders when no alternative method of  
16 persuasion is effective and other types of force are  
17 deemed not appropriate."

18 So that requirement there by the  
19 language of this provision applies in the instance  
20 of a closed area, correct?

21 A. I'm sorry. I was trying to find that  
22 section. What page are you on?

23 Q. Page 16.

24 A. 16. Okay. I was looking for a large G  
25 instead of a small G.

1                   Okay. What was your question?

2           Q.       That subsection there applies in the  
3 instance of a contained area; is that correct?

4           A.       Yes, for item (g).

5           Q.       And would that be distinct from a  
6 situation that we saw here, a fight on a pod floor  
7 with other inmates and officers in the vicinity?

8           A.       I'm sorry. I was reading and not  
9 listening.

10          Q.       Sure. Would you consider that distinct  
11 from the situation that we had here in this case?

12          A.       For this particular subsection, yes,  
13 it's different.

14          Q.       Okay.

15          A.       It's distinct.

16          Q.       It also refers to -- another section you  
17 highlighted talks about "Repeated use of chemical  
18 agents within a short period" not being permitted;  
19 "A pause between each application is necessary to  
20 allow the chemical agents to take effect and to  
21 determine if the offender inmate or  
22 probationer/parolee is compliant."

23                   So, in your experience, does OC spray  
24 have a delayed onset of effect?

25          A.       It can.

1 Q. Okay.

2 A. Yes.

3 Q. Does a dog bite?

4 A. I think a dog bite has an instantaneous  
5 effect.

6 Q. Okay. I'm turning to page 17 now. At  
7 the end of the first paragraph you refer to the  
8 testimony of VDOC's 30(b)(6) designee testifying  
9 that "...nothing in the operating procedures  
10 required patrol canine officers to use other forms  
11 of less lethal force before utilizing their  
12 canines." Do you see that --

13 A. Okay. Yes.

14 Q. -- right there?

15 A. Yes. Yes.

16 Q. Okay.

17 A. Yes.

18 Q. And you testified a moment ago that a  
19 use-of-force policy that incorporates a continuum of  
20 force -- I believe you stated that most of those  
21 policies would permit an officer to escalate to a  
22 higher level of force if circumstances required  
23 that.

24 A. Yes.

25 MR. DAVIS: Okay. I'm going to share



1 now. This is the 30(b)(6) deposition transcript.  
2 Madam Court Reporter, I'd like to make this  
3 Defendants' Number 1, 2, 3, 4, 5, 6, 7 -- 8.

4 (Defendants' Exhibit 8 was marked for  
5 identification.)

6 BY MR. DAVIS:

7 Q. Can you read this okay, Mr. Hurley?

8 A. You might want to enlarge it just a  
9 little bit for me, please.

10 Okay. Thank you.

11 Q. Okay (scrolling).

12 A. You might have to scroll back up. I'm  
13 sorry.

14 Q. (Scrolling.)

15 A. That's okay.

16 Q. And so the designee does testify here  
17 that the operating procedure does not expressly  
18 state that canine officers are required to use other  
19 forms of less lethal force before using the canine.  
20 However, do you see immediately before that he  
21 states, "...if you become a canine officer, you get  
22 trained on how to use your dog, which would be the  
23 last resort"?

24 A. I'm sorry. If you could point that out  
25 for me.

1 Q. (Indicating.)

2 A. Okay. Okay.

3 Q. So then would you consider that training  
4 then as instructing the canine handlers that -- that  
5 the dog is higher up in the continuum?

6 A. I might if the training materials or  
7 curriculum had any details or points where they  
8 could demonstrate they taught the things that he  
9 just mentioned, or if their canine handlers in their  
10 deposition testimony could articulate that, or there  
11 was documentation of any scenarios they conducted to  
12 demonstrate that, but I didn't find any of those  
13 details or evidence to corroborate or validate his  
14 statement in this deposition.

15 Q. I'm looking now at your statement here  
16 at the end of the next paragraph where you stated,  
17 "In no arena is a person in retreat considered to be  
18 posing an immediate threat and yet the VDOC Use of  
19 Force Policy allowed for this action because it was  
20 silent regarding any precautions, restrictions or  
21 controls for this very high level use of force."

22 So from your review of the evidence, did  
23 Officer McCowan indicate either in his reports or in  
24 his testimony that he, in fact, perceived  
25 Mr. Johnson to be retreating?

1           A.       No. I did not see that he indicated  
2       that he perceived retreat.

3           Q.       So would a -- how would a more  
4       structured continuum of force or the other policy  
5       restrictions you talk about here -- how would that  
6       have caused Officer McCowan to have perceived what  
7       Mr. Johnson was doing any differently?

8                   MR. JOHNSON: Object to form. You can  
9       answer if you have any idea, Mr. Hurley.

10          A.       I will answer the best I can with the  
11       way I think I understand the question, or I'll refer  
12       to my experience or training or training I've  
13       witnessed.

14                   And I think this comes out of the  
15       rebuttal report. I didn't see any evidence of  
16       teaching the canine handlers or officers to  
17       understand human behavior that could be interpreted  
18       in various ways so that when you see things you have  
19       a broader range of interpretation. Some it could be  
20       a threat and some it's a sign of deescalation or  
21       natural reaction to things, natural reaction to a  
22       predator. And that's why I focused on the flight,  
23       fight or freeze response, which is the normal  
24       behavior not consistent with the training. It's  
25       just any normal human being is going to do certain

1 things when they face a significant threat.

2 So when you have that type of threat  
3 attached to your side through a leash and you're  
4 responsible for using that force it's incumbent upon  
5 the agency to talk about natural responses of humans  
6 beings and their behaviors which may not constitute  
7 a threat, and to take into consideration when  
8 they're observing the behavior, where they enter  
9 into a situation. And there is no evidence that  
10 that was taught. And the national standards that  
11 the defense expert referenced brought out that  
12 cognitive bias was a key component of canine  
13 training, and I didn't find any evidence of that.  
14 And that goes directly to this incident, in my  
15 opinion.

16 BY MR. DAVIS:

17 Q. Okay. I think we'll be getting to that  
18 section of your report relatively soon.

19 There are a couple other statements here  
20 I wanted to ask you about in the next section here,  
21 being VI, VDOC's Canine Policies Fail To Take Into  
22 Consideration Other Challenges To Controlling  
23 Actions And Reactions In Canine Deployments, here on  
24 page 17.

25 A. Okay.

1           Q.     In the first subsection here you discuss  
2 K-9 unpredictability, and that includes an excerpt  
3 here in reference to the Nunez case.

4                     Was there a point that you found in your  
5 review of the evidence that the canine acted in this  
6 instance unpredictably or was outside of Officer  
7 McCowan's control?

8           A.     I did not.

9           Q.     Okay. And you include an excerpt from  
10 DOC's training curriculum on the following page,  
11 here on page 18. Would you acknowledge that DOC  
12 training recognizes the issue of canine  
13 unpredictability?

14          A.     Yes. That's my actual statement.

15          Q.     On page 20 you discuss how Officer  
16 McCowan had been bitten by the first canine that was  
17 assigned to him. He testified that after he had  
18 been bitten by his first dog he was no longer  
19 assigned to that dog, correct?

20          A.     Correct.

21          Q.     Okay. And so then he began training on  
22 the next dog, which was the one that was involved in  
23 this incident with Mr. Johnson, correct?

24          A.     Correct.

25          Q.     Did you see any evidence that that dog,

1 Shadow, ever bit Officer McCowan or somebody else  
2 who he had not been directed to bite?

3 A. I did not.

4 Q. All right. You state that, "K-9  
5 unpredictability and uncontrollability should be  
6 incorporated into the VDOC Use of Force policy."

7 In what way would that be incorporated?

8 A. Well, I think to emphasize the risk  
9 associated with canines in a facility, that other  
10 staff could be bitten, offenders could be bitten  
11 unintentionally, and, therefore, extreme caution  
12 must be exercised where you take these canines and  
13 how you use them and into what situations you go.

14 Q. From your review of the evidence are  
15 VDOC canine handlers and the dogs themselves trained  
16 in obedience to reduce the likelihood of an  
17 accidental bite?

18 A. It was in the training curriculum.  
19 Again, there was a lot of detail about that. There  
20 is detail about training the dog, what actions they  
21 would take to teach the canine proper behavior,  
22 whether it was sit and hold, how to respond to  
23 someone who had surrendered, those kinds of things.  
24 There wasn't a lot -- there was some discussion  
25 about teaching handlers or a discussion of how much

1 correction to give at times, harsh correction, harsh  
2 voice, tug on the lead, those kinds of things. So,  
3 yes, there was some documentation of obedience  
4 training.

5 Q. And then you also note in here that --  
6 you say the canine training prohibits the repeated  
7 applications of force.

8 And then you include an excerpt from the  
9 training manual, and that states not to continue  
10 with the application of force and -- if it's working  
11 and not use the dog multiple times when the  
12 pain-compliance force has not worked to that point.

13 Are you offering the opinion that  
14 Officer McCowan did not comply with his training?

15 A. Based upon comments from Mr. Burwell and  
16 my training, the exposure to different types of  
17 things such as painful-bites techniques, where --  
18 yes, we were trained that, okay, if you continue to  
19 apply a pain-compliance technique beyond a certain  
20 point you're actually escalating the use-of-force  
21 event and you could cause the offender to become  
22 aggressive when they, in fact, were not, they're  
23 just responding to the pain.

24 So given that the continuation -- this  
25 was at least the second or third bite upon

1 Mr. Johnson, as I understand it. He had several  
2 injuries to the forearm and the wrist and he was on  
3 the ground. He was in a compliant position. So the  
4 need to continue that -- first, the bite wasn't  
5 necessary. Second, the need to continue was not  
6 necessary. And it lasted much longer than, you  
7 know, a short application of pain compliance.

8 Q. So I want to unpack a little bit what  
9 you just said.

10 You stated that you understood this to  
11 be the second or third bite on Mr. Johnson. What  
12 evidence are you relying on to inform your opinion  
13 that he was bitten multiple times?

14 A. One, the medical report. I did look at  
15 that over the lunch break. I looked at the photos  
16 of the injuries. And I reviewed the video again.  
17 And it looks like when K-9 Shadow approaches  
18 Mr. Johnson in the area where they're going to go to  
19 the ground, Mr. Johnson testified that he gave the  
20 dog his arm because he didn't want to get bitten in  
21 the face. And it looks like the dog does grab Mr.  
22 Johnson by the forearm. And that appears to be  
23 consistent with McCowan's testimony and the defense  
24 expert's review of the video that the dog has  
25 Mr. Johnson by the arm and they go to the ground.



1 It looks like the dog switches position, you know,  
2 it's not totally clear from the video, but maybe  
3 closer to the wrist or hands than the forearm area.  
4 So it appears from the photos that he's got bite  
5 marks in several areas on his arm. And then the  
6 duration.

7 Q. I'd like to -- give me just a second  
8 here.

9 A. While you're doing that can I give you a  
10 specific page that I looked at from the medical  
11 documentation?

12 Q. Sure.

13 A. That would be Johnson 582000102. So  
14 that's at 582000102.

15 MR. DAVIS: And I'll have to -- I don't  
16 have that document prepared at the moment, so we may  
17 want to go back to that at a later time today.

18 I do have the photos here and I'd like  
19 to take a look at those.

20 THE DEPONENT: Sure.

21 (Defendants' Exhibit 9 was marked for  
22 identification.)

23 BY MR. DAVIS:

24 Q. Now, Mr. Hurley, are you offering an  
25 opinion from your review of the photos or the

1 medical records based on any kind of expertise in  
2 identifying bite marks?

3 A. No, I'm not offering that, but the  
4 medical notes indicate that they're from a dog bite  
5 or dog encounter. As a matter of fact, Johnson in  
6 582000100 -- 582000100, at the top of that note  
7 says, "Refer to dog bite QUD chart."

8 So this appears to me that this is in  
9 his medical file associated with what I believe to  
10 be the emergency room. This is for May 2nd, 2020.

11 I'm sorry. Bear with me.

12 Q. That's okay. I need to get this pulled  
13 up myself. I will take this off the screen share.

14 A. Sure.

15 Yeah. That was from Norton Community  
16 Hospital. N-O-R-T-O-N Community Hospital.

17 Q. Okay. And so while I am pulling up the  
18 medical record here I would like to go back to the  
19 photos.

20 A. Sure.

21 MR. DAVIS: Madam Court Reporter, can we  
22 make this our Number 10?

23 (Defendants' Exhibit 10 was marked for  
24 identification.)

25

1 BY MR. DAVIS:

2 Q. Is there anything that you identify in  
3 this photo as indicating that there were multiple  
4 bites?

5 A. Not from the photo, but, again, from the  
6 photos associated with the medical records. So --  
7 and I'm sorry -- Johnson 582000003. And I believe  
8 this is probably the facility nurse note prior to  
9 sending him to the community hospital. "Offender  
10 brought to medical due to altercation. Lacerations  
11 x 3 to right lower arm/wrist..."

12 I can't quite make that out.

13 "Multiple puncture sites to right lower  
14 arm/wrist. Laceration to left side forehead at  
15 hairline. OC utilized.

16 "All lacerations and punctures cleaned.  
17 Offender will be sent to Emergency Room for repair  
18 of lacerations. Dressings applied to wounds to  
19 control bleeding. Reddened area across low back."

20 So based upon the facility  
21 documentation, based upon the emergency room  
22 documentation, combined with the photos, I'm using  
23 their medical assessments to say there were multiple  
24 locations.

25 Q. Okay. Is this the document you're

1 referring to here?

2 A. It appears to be, yes.

3 Q. Okay. And I still need to -- let me  
4 stop the screen share a moment.

5 I can't seem to combine these, so we'll  
6 just take a look at the other Bates page that you  
7 referred to. This is Bates page 100 from the  
8 medical records from the hospital chart that you  
9 were discussing earlier.

10 A. Yes.

11 Q. Okay. And what's the portion of this  
12 that you referred to for...

13 A. I'm going to look at my document. I  
14 made several references, so it's probably not that  
15 particular Bates number. Let me get that for you.  
16 That will be the Bates number ending in 102.

17 Q. Okay. That's just a few pages down. Is  
18 it this?

19 A. Yes.

20 Q. Okay. So from the documents that you  
21 reviewed and the video can you tell whether Officer  
22 McCowan gave an additional command for the dog to  
23 bite as opposed to the dog adjusting its grip?

24 A. I cannot.

25 Q. Okay. And Officer McCowan had testified

1 that he released the dog from Johnson to avoid  
2 further harm to him even though he stated that  
3 Johnson had not complied with his order to remove  
4 his left hand, correct?

5 A. That's what he testified to, yes.

6 Q. Okay. I'm moving on now to subsection  
7 B, which is called Natural Responses and Failures To  
8 Recognize It. So regarding the citation here, the  
9 first excerpt in footnote 34, this is -- it appears  
10 to be an article from a website Medical News Today.  
11 Along with it it has the URL for a video. Do you  
12 see that?

13 A. Yes.

14 Q. Do you know if that article is from a  
15 peer-reviewed journal?

16 A. I do not.

17 Q. Do you know if this is an accepted view  
18 in the community of people with the relevant  
19 specialty here, I would guess psychologists or  
20 psychiatrists?

21 MR. JOHNSON: Object to form. Mr.  
22 Hurley, you can answer if you know.

23 A. I don't know the answer to that  
24 question.

25 What I do know is my next reference is

1 to a clip from Psychology Today, which has been in  
2 existence from my understanding for a long time, and  
3 it's consistent with the material contained in the  
4 VADOC basic correctional officer training. They do  
5 have a fairly extensive section detailed about  
6 fight-or-flight responses. I think I referenced  
7 that, but perhaps not, in this report. Maybe that  
8 was in the Garrett report.

9 But contained within the basic officer  
10 training curriculum VADOC has a fairly extensive  
11 section on fight-or-flight responses, which aligns  
12 with these two citations that I made. I'm not sure  
13 that I could pull that up at the moment, but I know  
14 that I saw that.

15 BY MR. DAVIS:

16 Q. So you understand that to be a part of  
17 the basic officer training?

18 A. Yes. Correct.

19 Q. Okay. Now, are you offering any  
20 testimony here regarding the fight-or-flight-or-  
21 freeze response based on your own experience in  
22 psychology or a related field?

23 A. No. And I don't hold myself out to be a  
24 psychologist --

25 Q. Okay.

1           A.       -- but I can rely upon my training or  
2 research and, in fact, I incorporated the flight or  
3 fight -- flight-or-fight response or freeze response  
4 in the training that I developed for the Ohio  
5 Department of Youth Services related to being in  
6 compliance with a consent judgment in use-of-force  
7 matters. And I referenced other sources to get the  
8 foundation for some of that.

9           Q.       There is another excerpt then that  
10 begins on page 23 and continues into page 24. This  
11 is from Dr. Homer Venters, the report states,  
12 "Former Medical Director for the New York City  
13 Department of Corrections."

14                    Would you tell me what the relevance of  
15 that excerpt is to this case?

16           A.       He talks about dual loyalty, and he  
17 explains that -- how medical staff can fail to  
18 follow their charge, I guess, or see offenders as  
19 their patients and respond to their reactions and  
20 behaviors as patients and/or witness use-of-force  
21 events which have fatal results where those staff  
22 fail to recognize that a person is in medical duress  
23 because they'd become tainted, that's my word, or  
24 jaded, for lack of a better word. So they fail to  
25 recognize natural human responses.

1                   So this is another way of supporting my  
2                   contention that you have to be able to recognize  
3                   normal reactions to certain things because it can  
4                   result in a use-of-force death when you fail to  
5                   recognize those things.

6                   I think that's also true in the  
7                   corrections industry in general. Many times inmates  
8                   no longer have a luxury of being viewed as having  
9                   normal human reactions. There is a tendency to  
10                  interpret everything they do as resistance, threat,  
11                  or aggression. So those reactions that any of us  
12                  would have are not recognized or only interpreted in  
13                  one way, which then can result in serious injury,  
14                  excessive force, or in-custody death. It can happen  
15                  to the medical staff and it can happen to the  
16                  corrections staff.

17                  And I believe it happened in this case  
18                  because there was no training to recognize the  
19                  natural reaction to a predatory canine ready to bite  
20                  or given the command to bite.

21                  Q.       And after that excerpt you discuss the  
22                  need for officers to be trained on fight, flight or  
23                  freeze. How is a correctional officer supposed to  
24                  distinguish a fight-flight-or-freeze reaction from  
25                  something that is genuinely threatening?



1           A.       Part of that comes through training  
2 and --

3           Q.       What -- I'm sorry. Go ahead, sir.

4           A.       So I already mentioned that you may use  
5 existing material, events, incidents, videos where  
6 somebody can assess what happened and say, "Okay.  
7 Here's a reaction. Here's what this inmate is  
8 doing. So let's go over this or let's run you  
9 through some scenarios to test that."

10                   Because if you never discuss it, if you  
11 never provide any examples, once again you don't  
12 deal with cognitive bias. And the only way to deal  
13 with cognitive bias is to include it in your  
14 training. That's why that national standard talked  
15 about cognitive bias. But I didn't find any  
16 evidence that the VADOC canine training curriculum  
17 did deal with cognitive bias or documented that they  
18 ever had.

19           Q.       Now, at least on part of this reaction  
20 that you discussed here, flight, fight or freeze,  
21 the first of those reactions being fight, correct?

22           A.       (No response.)

23           Q.       I mean irrespective of the inmate's  
24 intentions, whether it's a natural reaction or  
25 whether it's something premeditated, if an inmate

1 has a fight response to something isn't that still a  
2 security concern that would require a response?

3 A. It can, but it doesn't mean that it  
4 requires a significant-injury type of response. So  
5 let me explain it this way: Lots of times people  
6 think of fight and flight as a great big response.  
7 So I'm going to punch you and knock you out type of  
8 fight response. Well, there's very subtle types of  
9 things that represent fight response. For instance,  
10 if a fly lands on my forehead or a mosquito bites  
11 me, as most people do I'd probably slap that  
12 mosquito or brush that fly off. That's a very minor  
13 form of a fight response. It doesn't fall into this  
14 triggering all these emotions and everything, but  
15 it's just a normal reaction.

16 He just came out of a fight. He -- as I  
17 explained in my rebuttal report, he doesn't know  
18 necessarily who all is still around him or is a  
19 potential adversary. So when he comes up, as  
20 Officer Mullins pulled him up, it's a neural  
21 response for him possibly to still be in  
22 self-defense mode. It doesn't mean that he intends  
23 to attack the officer, it doesn't mean that he's  
24 going to hurt anybody else, but he's still in that  
25 fight-or-flight response.

1                   Recognizing that, as I said in my  
2                   rebuttal report, many officers would announce  
3                   themselves and break that concentration and that  
4                   response to let him know I'm the staff, I'm not an  
5                   adversary, I'm not a threat, to help break -- break  
6                   that fight-or-flight response that he's in. The  
7                   other piece of that is, I'm sorry, if I came up off  
8                   the ground and turned and saw a canine who was ready  
9                   to lunge at me, that also might be a natural  
10                  response for self-preservation and protection.

11                  So you can have those reactions, but it  
12                  doesn't mean that you're a threat to the officer.

13                  Q.       And aside from the positioning of his  
14                  hand and his fist you also talk about Johnson making  
15                  an effort to get the dog to stop biting, how that  
16                  would have been a natural response, and how Officer  
17                  McCowan should have recognized that response.

18                  What behaviors did you observe Johnson  
19                  engaging in while he was being bitten that's  
20                  consistent with him attempting to get the dog to  
21                  stop biting?

22                  A.       It appeared to me that when he was on  
23                  the ground face down with Shadow engaged on his hand  
24                  or forearm or something, that the free hand may have  
25                  been up either pushing on the dog's face or trying

1 to protect his hand or protect his head or some such  
2 motion. The video is from a distance that I cannot  
3 be certain exactly what Mr. Johnson was doing. It  
4 did not appear to be aggressive or, quote, fighting  
5 the dog. It appeared to be a behavior that would be  
6 consistent with fight or flight, trying to remove  
7 the dog.

8 Q. So your testimony is the reaction is  
9 what he's doing with the free hand?

10 A. From what I can see. And that would be  
11 consistent with Mr. Burwell's report talking about  
12 the natural reaction of people to struggle against  
13 the bite or try to get away from the bite.

14 Q. I'd like to move on now to here on page  
15 25, the next section, which is Failure Concerning  
16 Warnings.

17 You discuss the bark-and-hold practice  
18 included in an excerpt there. To your knowledge, is  
19 the bark-and-hold practice applicable in a  
20 correctional setting?

21 A. Not necessarily as defined by searching  
22 a building, and that's what my understanding is from  
23 these articles, they were talking about when they  
24 reference bark and hold. But the concept still  
25 applies, and Mr. Burwell referred to that, that

1 Mr. McCowan could have just had his canine bark  
2 while Mr. McCowan had the canine in a hold type of  
3 command. So Johnson is standing in front of him,  
4 the canine is still barking but realizes it's not  
5 been given the command to bite, so creating a  
6 barrier between McCowan and Johnson as a way to  
7 contain the situation, evaluate, and start dialogue.

8 Q. Do you know if that's something that  
9 would be incorporated into bark-and-hold training is  
10 to use the dog in that manner during a fight  
11 situation as compared to a search context?

12 A. I do not, but from the canine handlers  
13 I've had experience with it's my understanding they  
14 all have that ability, to use their canines to hold  
15 a suspect at bay or subject in a position in front  
16 of them where they can contain the situation.

17 Q. And the canine handlers you're referring  
18 to, are those police dogs or are those in  
19 corrections?

20 A. They were associated with the highway  
21 patrol, the Ohio State Highway Patrol. One of those  
22 handlers that I referenced in my report was a  
23 corrections officer, but he also served as a county  
24 sheriff's deputy. So his canine was his county  
25 sheriff's deputy's canine, but he also brought it in

1 for corrections work.

2 Q. Okay. Would that dog not have been  
3 trained for patrol use similar to the VDOC dogs  
4 we've been talking about here or would that dog have  
5 been trained in more of a search-and-apprehension  
6 method like a police dog?

7 A. He did use the dog in the county jail  
8 where he worked. I don't know the extent of all  
9 that, but he also used it for search and  
10 apprehension.

11 Q. Do you know whether bark-and-hold dogs  
12 bite more or less often than bite-and-hold dogs?

13 A. From what I found from research it was  
14 about the same, as I recall.

15 Q. And what was your source for that  
16 information?

17 A. Probably one of those that are listed in  
18 my footnotes, but I'd have to go back and look. I  
19 didn't put that in the report, I don't believe.

20 Q. Okay.

21 A. And that's as I can recall.

22 Q. Now, here on page 26 you include an  
23 excerpt from the training curriculum. And the VDOC  
24 training, according to this excerpt, requires the  
25 canine handlers to give warnings; is that correct?

1           A.       That's correct.

2           Q.       When you say whether it was realistic  
3 for Mr. Johnson to hear, understand, and  
4 instantaneously respond to warnings given by Officer  
5 McCowan, can you state or affirm from your  
6 experience or from the sources that you have  
7 researched if there is a sort of a standard reaction  
8 time?

9           A.       I can't cite a source that gives a  
10 standard reaction time.

11          Q.       Okay.

12          A.       But I think that the training and  
13 testimony goes to giving them a reasonable chance to  
14 respond to the command. And I know Mr. Burwell  
15 spoke to that too.

16                   I would hope that if I were coming up  
17 out of a situation where I had to defend myself, and  
18 Mr. Johnson did because Guy had the upper hand and  
19 was really pounding on him for the first part of  
20 that fight, that I would need a little time, more  
21 than a second or two, to get my faculties, take in  
22 what was around me, understand what I was being  
23 asked to do, and the chance to comply to it.

24                   And Officer McCowan had dispatched K-9  
25 Shadow on Mr. Johnson in approximately two seconds.

1 And you may be able to give multiple commands in two  
2 seconds, but there's no time in between each of  
3 those commands to expect a person to -- a normal  
4 human being to have a reasonable time to respond to  
5 that. Plus, I'm sorry, if you have an  
6 attack-trained canine at your side, telling me to  
7 get on the ground and expose my body with my face  
8 down to a canine that's very likely going to bite me  
9 and hurt me, I'm going to hesitate to do that. I  
10 really am. And I think that's natural.

11 Q. I'm moving on to the next section,  
12 Failure Concerning Excessive Force. We're still  
13 here on page 26.

14 A. Okay.

15 Q. You state that, "According to the VDOC's  
16 Statewide Canine Coordinator" and it appears your --  
17 actually, there is not a footnote there.

18 A. Correct.

19 Q. You state, "...the K-9 Handlers were not  
20 trained regarding excessive force issues, except  
21 that perhaps using a K-9 in a cell extraction event  
22 might lead to excessive force."

23 Do you happen to recall where in his  
24 deposition transcript this might be?

25 A. I would have to go back and look. And I



1 apologize. There were two different coordinators  
2 from my understanding. And I'll say their names  
3 incorrectly, but I believe the first one was -- is  
4 it Bernocco, something like that?

5 Q. Yes. And so that's the -- that was the  
6 30(b)(6) designee.

7 A. Then the second one was a sergeant. And  
8 I apologize for not having that reference there. I  
9 would have to find it.

10 Q. Let me pull up Major Bernocco's  
11 transcript here.

12 A. Okay. I'll try to find it myself.

13 Q. And I'll zoom in a little bit for you.  
14 Is this what you're referring to here?

15 A. If you could just scroll up a little bit  
16 and let me see what was asked before that or where  
17 they're at. I'm just seeing an answer.

18 Q. So I'm referring to your portion of the  
19 report in here that states that the Statewide Canine  
20 Coordinator testified that K-9 handlers were not  
21 trained regarding excessive-force issues.

22 A. Okay.

23 Q. And I did want to focus on this  
24 testimony here where it appears that Major Bernocco,  
25 the current statewide canine coordinator, states

1 here -- and I believe this might be the section  
2 you're referring to.

3 A. Okay. It could be. At least it matches  
4 with that topic.

5 Q. Now, it appears that in the same answer  
6 he states that they train to use appropriate force  
7 needed at the time of the incident or situation at  
8 hand and we always train to use the least amount of  
9 force.

10 Is that -- would that be consistent with  
11 training on the issue of excessive force?

12 A. Not necessarily. And if you pull the  
13 page back up, he goes on to say that, "We don't  
14 train on excessive force." Can we go back to that  
15 page?

16 So here are my concerns: You need to  
17 have some training so staff can recognize and can  
18 understand what types of things constitute  
19 unnecessary excessive force. And when I looked at  
20 the VADOC use-of-force policy or training materials,  
21 in their definitions of excessive force they use the  
22 term "excessive force". Well, it's hard to define a  
23 term when you use the term to make the definition.  
24 Excessive force is when you use excessive force.  
25 Well, that's not guidance. How does a person know

1 what constitutes excessive force if the definition  
2 uses the same term? There's no clarification there.

3 Q. Understood.

4 Your following testimony on page 27  
5 about scenario-based training and the requirement  
6 for detailed scenario guides -- are there any  
7 industry standards that you're referring to for  
8 that?

9 A. No. I can't speak to industry  
10 standards.

11 When I worked for the Ohio Department of  
12 Corrections those were some of the requirements that  
13 our training academy required us to live by, so to  
14 speak. Also when I worked for the Department of  
15 Youth Services as a consultant again the training  
16 department required that level of detail to approve  
17 the lesson plan. And then just from experience from  
18 running scenarios that if you don't have guidance  
19 from the instructors scenarios can get out of hand  
20 and people can get hurt, the instructors, the  
21 students, those kind of things.

22 And so you have to have good controls on  
23 the speed at which you're going to go and when  
24 you're going to go that speed what the role player  
25 may do so it matches with the skills that have been

1 taught up to that point, and safe words so you can  
2 stop a scenario if it gets into the realm of where  
3 somebody has been hurt, and that everybody  
4 understands those safe words, and basically why  
5 you're conducting the scenario, what you expect to  
6 get out of that, what the objectives are, what you  
7 expect the students to take away, how you're going  
8 to recap those points, the important ones that match  
9 the training material at that stage of the lesson  
10 plan. So without those things it's just all over  
11 the map and you have no quality control and you  
12 can't verify what was done.

13 And, in fact, one of the sergeants,  
14 which I think was a statewide canine coordinator --  
15 he was asked, "Do you know if the person you  
16 supervised was taught some of these things?"

17 He said, "Unless I taught them, I don't  
18 know."

19 So he verified the concern that I have,  
20 when you don't have those types of details even the  
21 instructors don't know what other instructors  
22 taught.

23 Q. On that same page you discuss Officer  
24 McCowan's testimony that they're trained to stop  
25 using force when the threat has ceased, and you

1 state that that is not the correct standard for  
2 excessive force.

3 What in your experience is the correct  
4 standard for excessive force?

5 A. What page are we on?

6 Q. I think that is on 27.

7 A. Okay. Sorry.

8 Okay. I see that. And I may not have  
9 included a reference to their -- the handlers'  
10 collective understanding of what constitutes threat.

11 They were equating failure to fully  
12 comply, from their testimony, as the threat  
13 remaining. And there were variations of what full  
14 compliance meant. Some of the testimony indicated  
15 that if they weren't in full compliance they could  
16 still be considered a threat.

17 So my concern was with their  
18 understanding and definition of threat as being not  
19 in full compliance, so, therefore, you have the  
20 passive or no resistance but in noncompliance as  
21 being considered a threat. So my concerns were with  
22 their definitions and classification of threat.

23 Q. You next include an excerpt from  
24 Mr. Burwell on page 27 and going into 28. Are you  
25 adopting that as part of your opinion?

1           A.     Yes.

2           Q.     Do you have experience with the  
3 prey-drive behavior in dogs?

4           A.     I do not.

5           Q.     Okay. Do you have experience with the  
6 reaction -- seen the reactions of a person being bit  
7 by a dog?

8           A.     No, not directly, but from research and  
9 watching the videos, and I can rely upon other  
10 experts, which I've done in this case --

11          Q.     Uh-huh.

12          A.     -- and trust his expertise and his  
13 experience, which is extensive.

14          Q.     Turning now to page 28. This is section  
15 VII here. It's False Narratives And False  
16 Justifications.

17                 This includes an excerpt from one of the  
18 -- it appears to be one of the monitor's reports  
19 from the Nunez case. And you put some language in  
20 there that talks about ostensibly lawful  
21 applications of physical force to mask the  
22 intentional infliction of punishment, retaliation or  
23 reprisal on prisoners.

24                 Have you seen any evidence here that  
25 Officer McCowan intended to punish or retaliate

1     against Mr. Johnson?

2             A.     No, but with the knowledge of infliction  
3     of pain and injury -- you know, it's  
4     disproportionate to the objective risk. And that's  
5     the rest of the quote -- or parts of the quote from  
6     Mr. Martin.

7             Q.     Did you include this to speak to any  
8     belief that this, in fact, was the situation here,  
9     that Officer McCowan was using pretextual force as  
10    an intention to punish Mr. Johnson or to retaliate  
11    against him in some way?

12            A.     Not under that definition, no, but I am  
13    saying it was not proportionate to the actions that  
14    Mr. Johnson presented to Mr. McCowan.

15            Q.     So that if you were to draw any  
16    conclusions based on this language from Nunez,  
17    you're saying the basis for that would be just the  
18    nature of the force incident itself?

19            A.     Well, I'll deal a little bit with the  
20    pretextual part. It appears the practice in VADOC  
21    and the canine handlers -- and as I spoke to a  
22    moment ago, their definition of threat is anything  
23    but 100 percent in compliance of some nature, be  
24    that down on the ground, hands out, palms up, or  
25    some variation of that. That appears to be their

1 testimony. That appears to be what they did in this  
2 case.

3 So that sets the stage for a very quick  
4 use-of-force authorization. And some of them also  
5 testified to they thought about what they would have  
6 to answer to versus doing nothing or doing  
7 something. And in their apparent definition doing  
8 something means use force. Now, does it mean stop  
9 and hold? Does it mean engage in verbal  
10 deescalation? Does it mean you step back when you  
11 can, give space? So I think from what I've seen it  
12 appears that pretextually they are predisposed for a  
13 very quick decision to use a high level of force.

14 MR. DAVIS: Madam Court Reporter, I  
15 noticed it seemed like you may not have gotten all  
16 of that.

17 BY MR. DAVIS:

18 Q. And, Mr. Hurley, I apologize. It  
19 sounded like you broke up a little bit there. Did  
20 that --

21 A. Okay. I can repeat if you need me to.  
22 My internet gave me an unstable notice a second ago.  
23 So did I cut out?

24 Q. It's still a little bit shaky right now.

25 A. Do you want me to try to call in and



1 pick up the audio that way?

2 Q. Do we want to take maybe five minutes  
3 and see if when we come back if we've got a little  
4 bit of a better connection, and if that doesn't work  
5 we can try calling in?

6 Yeah. That's fine.

7 MR. JOHNSON: Is that okay with you,  
8 Pat?

9 THE DEPONENT: That's fine.

10 (Recess from 2:29 p.m. to 2:38 p.m.)

11 BY MR. DAVIS:

12 Q. Okay. I'm turning now to page 25.  
13 After the excerpt you included there you state that,  
14 "There is evidence that a false or exaggerated  
15 narrative was used in this case. Among other  
16 things, the K-9 handler (Officer McCowan) claimed  
17 that Mr. Johnson made an aggressive or threatening  
18 move towards the officer (Officer Mullin) who had  
19 used chemical agents."

20 Did the evidence you reviewed indicate  
21 that this was a false statement by Officer McCowan  
22 rather than his -- being his genuine perception?

23 A. I'm sorry. What page are you on?

24 Q. 29.

25 A. Okay. I thought I heard 25.

1                   Okay. And your question is?

2           Q.       From the evidence you reviewed did that  
3 show you that the statement made by Officer McCowan  
4 was false instead of being his genuine perception of  
5 what was occurring?

6           A.       It doesn't match the video evidence and  
7 it doesn't match the video evidence that was  
8 presented to him during his deposition when he had  
9 opportunities to recognize or acknowledge that  
10 Mr. Johnson was stepping back. I think it goes to  
11 the -- partially to the pretextual concerns that I  
12 discussed just prior to the break and some of the  
13 interpretations of lack of full compliance  
14 represents threat.

15                   So if you're not looking for other  
16 things, and if you interpret every behavior as a  
17 threat, that leads to exaggerated claims where your  
18 world only perceives actions in one way.

19           Q.       Did you review reports of any other bite  
20 incident by Officer McCowan that you believe to be  
21 false?

22           A.       I don't believe I did. I guess what I'm  
23 trying to say here is that I believe the canine  
24 handlers are predisposed to interpret many behaviors  
25 as a threat.

1 Q. I understand.

2 A. But --

3 Q. I'm sorry to cut you off, sir. I'll let  
4 you go ahead.

5 A. -- which in the experiences that I've  
6 had, experience directly with officers myself, in  
7 use-of-force events I've monitored, I'm not seeing  
8 officers react the same way to the same situation  
9 under the same circumstances. Their perceptions  
10 would be different because they have been trained in  
11 the use other techniques so it would not necessarily  
12 have drawn the same conclusions. They would have  
13 seen it for what it was.

14 Q. So I'll ask the same question regarding  
15 reports of other bite incidents.

16 Well, let me ask you, did you review any  
17 reports of any other bite incidents other than this  
18 one? I won't ask you to disclose information you  
19 obtained solely through the Garrett matter since I  
20 understand you have a protective order in that.

21 A. Okay. And again they both -- I've  
22 looked at information in both cases, but for me to  
23 sit here and say specific to Officer McCowan I can't  
24 say that in particular. I believe I have, but, you  
25 know, there's a blending for me in terms of an

1 overlap of materials. Does that make sense? That's  
2 in one part probably where the basic correctional  
3 officer training issue came into play.

4 Q. Yeah. And so -- well, then let me ask,  
5 are there any reports from any other bite incidents  
6 or any materials regarding other bite incidents by  
7 DOC handlers that you have listed in the materials  
8 that you reviewed for your report?

9 A. If they were received as part of  
10 Garrett, yes. Would that make sense? I don't know  
11 how to answer that question correctly, I guess. But  
12 they -- those issues weren't relied upon for this  
13 case.

14 Q. Okay.

15 A. But let me put it this way: I just  
16 tried to focus on this particular incident --

17 Q. Uh-huh.

18 A. -- and the factors of this incident.

19 Q. Okay. So you aren't offering any  
20 opinion about any other incidents here?

21 A. No.

22 Q. Okay.

23 A. Other than what I picked up from their  
24 deposition testimony or the statewide coordinator  
25 testimony or training curriculum information or the

1 lack thereof.

2 And I did want to add to one of my  
3 previous answers, if that's okay.

4 Q. Sure.

5 A. You asked me a question related to is  
6 there a national standard requiring scenario guides  
7 or instructions and those kinds of things, or a  
8 question to that effect, so --

9 Q. Uh-huh.

10 A. And I talked about my experience with  
11 the Ohio Department of Youth Services, part of the  
12 consent judgment, one of the monitoring team members  
13 was responsible for training, a person by the name  
14 of David Roush, and he did review all the training.  
15 I saw him at some of those training sessions. So he  
16 was one of the driving forces for the style of the  
17 lesson plans, the details of the lesson plans and  
18 requirements for the lesson plans. So it was an  
19 additional, I guess, requirement to comply with his  
20 request to meet the training standards.

21 Q. And which case did you say that was in?

22 A. That was SH versus Stickrath.

23 Q. And that -- I think you testified that  
24 did not include any canine issues, correct?

25 A. Correct.

1 Q. Okay.

2 A. But just going to my expectations for  
3 scenario guides and the details of the scenario  
4 guides, that's where my reference would come from.

5 Q. I'm going to move on now to the next  
6 section of your report. This is Section VIII,  
7 Event, beginning on page 29.

8 A. Okay.

9 Q. You discuss the possibility of using a  
10 fight break-up technique while the fight was ongoing  
11 with Mr. Johnson and Mr. Guy. In your experience is  
12 it normally the expectation for a correctional  
13 officer to physically place themselves into an  
14 inmate fight to attempt to break it up?

15 A. No. And that's not what my report is  
16 implying. In fact, we train against getting between  
17 two fighters. That's stupid. It'll get you -- so  
18 the technique that I'm referencing is applied from  
19 behind the inmate, and it usually takes two people  
20 to apply it to both inmates.

21 So the training does teach to separate.  
22 And it is effective. I've used it. I've watched  
23 other staff use it. So it's one option that was  
24 available here. And the reason I say that is  
25 because when Officer Mullins did pull Mr. Johnson to

1 separate him from the fight Mr. Johnson separated.

2 Q. On page 33 you discuss that it appeared  
3 that Mr. Johnson was trying to step around Officer  
4 Mullins and that he appeared to be trying to  
5 deescalate himself.

6 Did you gather from anything in his  
7 testimony that this was what he was intending to do  
8 here?

9 A. Not on this point directly, but he did  
10 testify that he had not been and would not be  
11 aggressive towards the officers, that he had no  
12 intention of hurting an officer.

13 Looking at the video, at his behavior  
14 associated with that, that matches his testimony in  
15 this case, because at that point with Officer  
16 Mullins he's in direct contact with Mr. Johnson. So  
17 if there's ever an opportunity for Mr. Johnson to  
18 assault an officer, to do so that it would be  
19 perceived as a threat, this is the moment. They are  
20 face to face, body to body, and Mr. Johnson steps  
21 away.

22 Q. And I'm going to jump ahead to your  
23 analysis here --

24 A. Sure.

25 Q. -- that begins on page 47.

1           A.       Okay.

2           Q.       On 47 and going into 48 you refer to the  
3       30(b)(6) designee's testimony that scenario-based  
4       training wasn't required; it would have varied  
5       depending on who ran the session.

6                   Do you recall from your review of the  
7       evidence whether Officer McCowan himself testified  
8       about whether he went through scenario training?

9           A.       The dog handlers or canine handlers did  
10       testify that they had gone through scenario  
11       training. They made reference to that, but most of  
12       those were fairly generic without any detailed  
13       description of what actually was conducted during  
14       that training, and there was no documentation to  
15       validate (video transmission interruption)...

16                   THE REPORTER: Mr. Hurley, we lost you.

17                   THE DEPONENT: I may have to call in.

18                   MR. JOHNSON: Let's go off the record.

19                   (Recess from 2:53 p.m. to 2:57 p.m.)

20                   (The answer was read by the reporter.)

21       BY MR. DAVIS:

22           Q.       Mr. Hurley, on pages 49 to 50 you  
23       discuss that the testimony of the two canine  
24       officers along with Major Barbetto was inconsistent  
25       about what they understood compliance to be:



1 Officer McCowan stated that compliance meant hands  
2 out, legs crossed, complying with orders; Major  
3 Barbetto said that compliance meant hands out, palms  
4 up and not moving; and Officer Baker said that --  
5 that attempting to fight off a bite was not in  
6 compliance.

7 How were those answers inconsistent with  
8 one another?

9 A. I'm sorry. You're on page 49?

10 Q. Going into page 50 and ending at  
11 footnote 65.

12 A. I'm going to -- and I'll answer that  
13 question, but I think I need to get an adaptor for  
14 my phone so I can put in a headset so I can hear the  
15 questions.

16 Q. Okay.

17 A. I'll answer if you want before we take a  
18 break, but -- I'm not trying to avoid the question,  
19 but --

20 MR. DAVIS: No. Why don't we go back  
21 off for five minutes?

22 MR. JOHNSON: Yeah. That's what I was  
23 going to suggest. Why don't we take a five-minute  
24 break and we'll re-ask the question to him and pick  
25 up from your pending question.

1 (Recess from 2:59 p.m. to 3:06 p.m.)

2

3 MR. DAVIS: Madam Court Reporter, could  
4 you please read back to Mr. Hurley the last question  
5 I asked before we went off the record?

6 (The question was read by the reporter.)

7 (Off-the-record discussion)

8 THE DEPONENT: So I'm sorry. I don't  
9 want you to have to ask the question again, but I  
10 heard you say they seemed similar to you, so why am  
11 I saying there's differences. In essence, that's  
12 how I recall the question.

13 BY MR. DAVIS:

14 Q. That's the gist of it, yes, sir.

15 A. Okay. So each definition is slightly  
16 different on what position the inmate has to be in  
17 to achieve compliance or be considered in compliance  
18 in reference to different things.

19 You know, legs crossed, both hands out?  
20 I don't recall seeing inmates on the ground in this  
21 video with legs crossed. So I'm not sure when and  
22 exactly how. Is that a kneeling position with your  
23 legs crossed as I described earlier or face down  
24 legs crossed? Is that only in one person's  
25 definition? You know, when is the

1     surrender-compliant position is what I'm trying to  
2     get at. And if there's differences among the  
3     handlers, then how are inmates supposed to know  
4     exactly what the correct position is?

5                     And I understand there is inmate  
6     handbook direction about get on the ground, do those  
7     kind of things, but it just seems to me that each  
8     handler had a different understanding of exactly  
9     what he was supposed to do to be considered no  
10    longer a threat.

11            Q.     Understood.

12                    I'm turning now to page 52, and you  
13    reference Mr. Barbetto's testimony. This is at the  
14    end of the first paragraph. And you state that, "He  
15    did not suspect the presence of a weapon and" --  
16    this is referring back to his own prior use-of-force  
17    incidents when he was a canine handler.

18                    "He did not suspect the presence of a  
19    weapon and did not base his use of force decision  
20    solely upon a suspicion of a weapon and they were  
21    trained to consider the totality of circumstances  
22    when making use of force decisions."

23                    Is your testimony here then that canine  
24    use is only justified in the presence of a weapon?

25            A.     No, that's not my testimony, but I would

1 expect that before you would use this level of  
2 use-of-force options. What I was trying to use, to  
3 tell it a little better, his testimony for was to  
4 demonstrate that the lack of ability to see an  
5 inmate's hands was not necessarily sufficient for  
6 his deployment of the canine. In part that was  
7 Mr. McCowan's continued justification, the continued  
8 bite-and-hold technique used by his canine, because  
9 he was not able to see Mr. Johnson's hand.

10 Q. And so are you saying that's not  
11 sufficient according to the standard that  
12 Mr. Barbetto had articulated there, or is that, you  
13 know, in accordance with your opinion and your  
14 understanding of use-of-force principles?

15 A. I'm going to just speak to the  
16 conditions of this situation because it gets  
17 convoluted if we try to talk about all kinds of  
18 different scenarios. But given what Mr. McCowan was  
19 faced with when he entered the unit, and the  
20 considerations that I've discussed in my report, and  
21 options that he had, and one of those was to use the  
22 canine as a barrier and start that dialogue to gain  
23 compliance, and/or you have an offender who is  
24 actually engaging in compliant behavior, he gave his  
25 arm to the canine and went to the ground. You know,

1 those indicators are of compliance, not of threat,  
2 not of continued threat.

3 Q. I'm continuing on that page. You  
4 discuss Officer McCowan's testimony, and then at the  
5 end of the third paragraph you state, "To use  
6 Officer McCowan's logic, if a police officer arrived  
7 on the scene of a fight and had not seen a weapon,  
8 did not have any reason to believe one of the two  
9 people in the fight had a weapon, the police officer  
10 could and should shoot one of the fighters 'just to  
11 be sure.'"

12 We talked about this somewhat earlier,  
13 but in this instance here with this statement are  
14 you saying that the shooting is comparable to the  
15 use of the canine?

16 A. It's a high level of force. I'm  
17 applying Officer McCowan's logic as an analogy to a  
18 rule-enforcement situation. He also testified that  
19 he didn't have reason to suspect that Mr. Johnson  
20 had a weapon, and he also testified that all other  
21 force options had been used, so the only thing left  
22 was the use of the canine.

23 Well, that's not standard practice and  
24 that's not what officers are supposed to do when  
25 they arrive on the scene. They're supposed to

1     assess the situation and establish their control of  
2     the situation, and that includes using verbal  
3     engagement, taking the time if you've got time to  
4     establish safety for yourself -- he had that with  
5     that canine -- and use that advantage to talk the  
6     person through compliance. But in McCowan's world,  
7     according to his testimony, when he arrived on the  
8     scene all those other things were out the window and  
9     he was already a long way down the use-of-force  
10    continuum to a very short decision-making matrix to  
11    process that "I'm going to deploy the canine" almost  
12    instantaneous.

13           Q.     I'm going back to that statement and the  
14    comparison you make there. In your experience, and  
15    all other things being equal, would you expect a  
16    greater likelihood of a weapon being present in a  
17    prison fight compared to a street fight?

18           A.     Not necessarily. And I don't know how  
19    many weapons are found in street fights. Certainly  
20    I've seen and responded to and reviewed thousands of  
21    cases involving inmate-on-inmate fights, some with a  
22    weapon and some without. So, yes, for officer  
23    safety you always have to be concerned that there  
24    may be a weapon or there could be a weapon, but it  
25    doesn't mean that you go to a high level of force

1 immediately upon -- I mean when you've just  
2 encountered, when you arrive into the unit, without  
3 knowing any of the other factors or without taking a  
4 moment to assess those factors when you have the  
5 chance to do so.

6 You know, officers around the country  
7 every day have to deal with these situations without  
8 the luxury of a canine to protect them. And in many  
9 situations they're able to gain compliance, still be  
10 safe, without necessarily using force in a situation  
11 like this one and address their concerns safely.

12 Q. Okay. I'd like to move on now to the  
13 list of opinions here beginning on page 53.

14 A. Okay.

15 Q. As we discussed at the beginning of the  
16 deposition, just for my understanding of what is  
17 being offered as an opinion here and what's being  
18 offered in support of those opinions, I wanted to  
19 walk through with you to see if you believe that,  
20 you know, any particular parts of your opinion, you  
21 know, support any particular ones of these sort of  
22 bottom-line opinions at the end of the report.

23 So starting with opinion number 1, "The  
24 use of a K-9 in this case was not warranted or  
25 supported by accepted correctional practices, nor

1 was it consistent with law enforcement practices for  
2 K-9 deployments. Mr. Johnson was not resisting or  
3 demonstrating any threat when a K-9 was commanded to  
4 bite him and cause serious permanent injuries."

5 Is there any particular sections of your  
6 report that you consider to be in support of this  
7 opinion?

8 A. Yes.

9 Q. Okay. What are those?

10 A. I'll have to get the pages out, but the  
11 sections where I reference the Human Rights Watch  
12 research regarding the use of canines in the  
13 correctional industry; the Department of Homeland  
14 Security policy regarding prohibiting the use of  
15 canines in a use-of-force event or the presence of a  
16 canine with the presence of detainees; monitoring --  
17 or the monitor's report related to the restrictions  
18 for the use of canines in the corrections  
19 environment; references to Mr. Burwell's report, and  
20 some citations he made in his experience as a law  
21 enforcement officer and a law enforcement officer  
22 who has used canines, trained canine teams and  
23 evaluated canine teams. So I think those would be  
24 some of the -- and my review of thousands of  
25 use-of-force cases -- would be the support where



1 it's not consistent with accepted correctional  
2 practice or normal practice.

3 Mr. Johnson was not resisting or  
4 demonstrating any threat. When he had the  
5 opportunity to assault an officer and they were  
6 physically in contact he did not do that. He, in  
7 fact, stepped away from that officer and as  
8 documented in the video and through deposition  
9 testimony he took five steps back at least. And  
10 Officer McCowan acknowledged that. And I believe  
11 that was either for the second deployment or at the  
12 first deployment. And I gave supporting references  
13 to fight-or-flight responses that would explain  
14 Mr. Johnson's behavior. And no one documented that  
15 he made any verbal threats towards any staff. I  
16 never saw a statement that he said "I'm going to  
17 hurt you, stab you, slap you, kick you, punch you,  
18 kill you" or do any such thing.

19 So that wouldn't support a claim that  
20 Mr. Johnson had intentions to assault. He didn't  
21 step towards staff in an aggressive manner. He  
22 stepped back.

23 Q. Okay. Same question for opinion number  
24 2.

25 A. I think I just described some of that.

1 Q. Okay.

2 A. Yeah. Well, one thing I didn't speak  
3 to, in reviewing the video, particularly as  
4 Mr. Johnson is going to the ground and as he's going  
5 he uses his left hand to brace himself as he goes to  
6 the ground, an open palm, like that (indicating), as  
7 he's going down. And, as I said, he had that hand  
8 out in front of him at some point while the canine  
9 was still engaged where his hand was visible or  
10 accessible to Officer McCowan. So his hand wasn't  
11 hidden under his body the entire time. In fact, it  
12 was out where it could be seen in some manner in  
13 front of McCowan for a significant portion of that  
14 prolonged bite and particularly going down to the  
15 ground.

16 So, to my opinion, the video evidence  
17 does not support every contention that Officer  
18 McCowan is making.

19 Q. Just to follow up on that last bit  
20 there, did you see in the video his hand go under  
21 his body?

22 A. For a brief moment. I would have to  
23 watch that video again. I don't know if we want to  
24 do that.

25 Q. I'm just asking from your recollection.

1           A.     I believe it did, but for not very long.  
2     And that can be part of the response of protecting  
3     your fall to the ground or going to the ground. Is  
4     it normal for any of us to tuck our arms under the  
5     body when someone is trying to restrain them? Yes,  
6     that can happen and does happen, but it didn't stay  
7     there it did not appear to me for very long, that  
8     his other hand it appears came out, but again from a  
9     distance it's hard to tell.

10           Q.     Okay. Opinion number 3 I did not see  
11     discussed in the body of the report, unless I'm  
12     mistaken. Was there anywhere prior to this opinion  
13     where you talked about the bite ratio?

14                     Mr. Hurley, you're on mute.

15           A.     Sorry. I must have touched the mouse.  
16                     I do recall discussing that prior to  
17     that statement. It could be a crossover between the  
18     other case and this one --

19           Q.     Okay.

20           A.     -- but it goes to the difficulty to make  
21     a valid assessment given the frequency of loss of  
22     records.

23           Q.     And that loss of records you're  
24     referring to is from the DINGO system, correct?

25           A.     Correct.

1           Q.     Did you review any documents that  
2     pertained to calculating the bite ratio based on  
3     incident reports that were filed in the CORIS  
4     system?

5           A.     I don't believe I did. If that's a new  
6     system, I didn't receive, that I'm aware of,  
7     anything associated with that. The only thing I  
8     would have reviewed, and I'll probably say it wrong,  
9     is their monthly canine patrol reports.

10          Q.     Uh-huh.

11          A.     And that references if they're just  
12     routine patrol or if they're responding to an  
13     incident. And then I would have to look at the  
14     actual incident itself to get the description and  
15     find out what they encountered and whether they  
16     engaged or did not engage.

17          Q.     Can you speak to from your experience if  
18     a bite ratio was known what an acceptable ratio of  
19     bites versus canine responses would be?

20          A.     The only thing that I saw that was  
21     related to that was in some of the research  
22     articles, that anything above 30 percent, but those  
23     were applied to law enforcement in the community,  
24     not in a corrections environment. So, to my  
25     knowledge, there is no minimum acceptable bite ratio

1 for the corrections environment. It's all  
2 street-cop use in the community where the ratio is  
3 considered. But I think it's important for an  
4 agency to know how often canines are used in a  
5 use-of-force event and sort of to have what they  
6 deem to be appropriate, necessary or correct.

7 And I think the point of this is with a  
8 system that loses data or makes it really difficult  
9 to make an accurate assessment, the oversight  
10 portion of that suffers. You can't have a robust  
11 oversight system if your data keeps missing or if  
12 you're not doing an analysis on your own.

13 Q. Understood.

14 Moving on to opinion number 4, do you  
15 have any corresponding analysis anywhere else in  
16 your report regarding this opinion?

17 A. You mean other than his testimony?

18 Q. No. I mean any discussion or sources  
19 cited in your report about what you state here in  
20 opinion number 4.

21 A. Well, I'm not sure -- rephrase that  
22 question because I'm not sure exactly what you're  
23 asking me to answer.

24 Q. So does -- is there any discussion, you  
25 know, in the main body of the report, what we've

1 been talking about for most of the day, related to  
2 this ultimate opinion that you offer here, number 4  
3 on page 53, regarding Mr. Barbetto?

4 A. I don't know if there was a dedicated  
5 section of the report to this specific point,  
6 perhaps the collection of different sections of the  
7 report where there was testimony about these types  
8 of issues, but again I was going to the oversight  
9 concern or even within the training curriculum they  
10 talk about proper supervision of the canine program.  
11 Well, these things in this item number 4 would fall  
12 into that category.

13 Q. So from your review of the evidence did  
14 that show you whether Mr. Barbetto reviewed the  
15 video and bite reports after each use-of-force  
16 event?

17 A. From his testimony I didn't see  
18 documentation of that; in other words, any form with  
19 his signature that he had reviewed it, at least as I  
20 recall. And he indicated that he did look at those,  
21 as it says here, but the investigators never  
22 contacted him or got his opinion or sought him out  
23 to say "Was this the proper use of a canine, was  
24 this okay, or is it something they should have done  
25 differently?" None of that.

1                   And even though he said in his prior  
2                   experience, as I understand it, he had conducted  
3                   use-of-force investigations, he just hasn't  
4                   conducted canine use-of-force investigations. And  
5                   if I'm mischaracterizing that, I apologize, but  
6                   that's what I recall.

7                   Q.       Well, Mr. Barbetto was experienced prior  
8                   to being the statewide coordinator as a canine  
9                   handler, correct?

10                  A.       I believe so, yes.

11                  Q.       Would it be -- would it be fair to state  
12                   from that that he would have familiarity with policy  
13                   and training requirements and the practices  
14                   involving use of force?

15                         MR. JOHNSON: Object to form.

16                   Mr. Hurley, you can answer if you know.

17                  A.       He should have. My concern here is it  
18                   doesn't appear that he was applying it in any manner  
19                   which would constitute effective oversight. He was  
20                   basically looking at it but not making any  
21                   conclusions and leaving it up to the investigators  
22                   or the investigations division to make all the  
23                   determinations. And they weren't consulting him and  
24                   he wasn't engaging them, so I'm not sure what the  
25                   purpose was for him to review the cases if he didn't

1 really do anything with it.

2 BY MR. DAVIS:

3 Q. And I'll move on to opinion number 5.  
4 Is there any portion of your report that corresponds  
5 to this opinion?

6 A. I can't recall that specific other than  
7 McCowan's deposition, which is referenced in this  
8 footnote 93.

9 Q. So is your opinion here that it was  
10 improper to have patrol canines trained for that  
11 purpose and not for -- well, let's start with  
12 contraband detection.

13 What would be the reason why that would  
14 be improper?

15 A. I'm not saying training a canine for  
16 contraband detection would be improper. It is  
17 proper, and I have used canines for contraband  
18 detection.

19 I guess the point I was trying to make  
20 here is, I didn't see training of those canines that  
21 are being used in the facilities for any other  
22 purpose other than patrol. Now, VADOC may have  
23 other canines that are used for these other  
24 purposes, but they're not the canines that are  
25 walking inside the prison is my understanding. They



1 have other canine resources to do those other  
2 things, but it appears to be the sole purpose for  
3 the canines in the prison -- it is for a show of  
4 force and/or a use of force and not for anything  
5 else.

6 Q. If there were other canines that were  
7 used for -- let's pick the contraband example right  
8 now. And so if there were canines trained for the  
9 purpose of use of force in patrol and canines -- a  
10 different group and different handlers trained for  
11 contraband detection, would that be a problem, in  
12 your view?

13 A. Not based on the way you phrased the  
14 question, no, but my concern is -- let's take that  
15 large case that I've referenced in the Nunez report  
16 in district court. It's my understanding those  
17 canines are capable of doing various things and  
18 they're not solely at the jail for the purpose of  
19 use of force only. They do have detection  
20 capabilities and primarily are used for that. And  
21 they're not routinely used for a fight break-up or  
22 this type of event.

23 So it seems to me the VADOC focused on  
24 use of force with the canines, that that's their  
25 mission and that's their purpose and that's how we

1 use them.

2 Q. From your experience do you know whether  
3 different breeds of dog would be more or less  
4 effective in those different roles?

5 A. I do not. Again, the research talks  
6 about different breeds have stronger predatory  
7 instincts or responses and some may not have that as  
8 strongly as others. So it would depend on the  
9 purpose of what you use them for, but I'm not the  
10 expert. That's why we have Mr. Burwell.

11 Q. Okay. On opinion number 6 is there any  
12 specific portion of your report that you would offer  
13 in support of that?

14 A. Well, I think throughout my report, you  
15 know, I talked about how officers routinely respond  
16 to fight break-ups and different options that they  
17 have to use. So saying it was reasonable for an  
18 officer to choose to use a canine to respond to this  
19 incident with Mr. Johnson's behavior does not match  
20 with what other corrections officers are doing  
21 across the country.

22 No weapons were found and McCowan  
23 testified that he didn't have any reason to believe  
24 that Mr. Johnson had a weapon.

25 I cannot find that any reasonable time

1 was allowed for Mr. Johnson to comply with orders to  
2 get on the ground if, in fact, he was given the  
3 number of orders that Officer McCowan claims that  
4 were given. He might be able to state those orders  
5 within two seconds, but give the person the time to  
6 actually respond to it. And that's the reason I  
7 also included the parts about the OC spray in using  
8 an application and giving the person the time to  
9 experience the effects. Same concept, just applied  
10 differently. So he didn't have time to respond and  
11 comply.

12 Then there are assessment criteria.  
13 I've talked about that. It doesn't have  
14 fight-or-flight or normal human reactions to a  
15 threat. And so, therefore, if they don't train  
16 that, they don't understand that, they're not going  
17 to recognize it. And it didn't because he was  
18 reacting in a way consistent with fight or flight.  
19 So I think that addresses number 6.

20 MR. DAVIS: Ms. Adams, did you get all  
21 of that last part?

22 THE REPORTER: I think I did. I think  
23 his picture froze, but I don't think his voice  
24 froze.

25 (Answer read by the reporter.)

1 THE REPORTER: Did I get it all?

2 THE DEPONENT: Yes. From my end, yes.

3 BY MR. DAVIS:

4 Q. Okay. On opinion number 7 is there a  
5 particular part of your report corresponding with  
6 that?

7 A. Yes. In my report I talked about their  
8 policies, the use-of-force continuum, where it fell  
9 in there or not. I cited some testimony from the  
10 canine statewide coordinator or other canine  
11 handlers. And I think we even went through some of  
12 that testimony while we were speaking.

13 So, yes, based on those things from the  
14 testimony, from the requirements of compliance,  
15 which I mentioned, I think that supports number 7.

16 Q. Same question for number 8.

17 A. Okay. I included snapshots of video  
18 evidence in my report, and within those snapshots I  
19 also provided text boxes to demonstrate what I was  
20 seeing. So I think it's factual, as far as I see  
21 it, that Mr. Johnson stepped away from Officer  
22 Mullins, did not do anything aggressive to Officer  
23 Mullins, nor did he do anything aggressive towards  
24 any other staff. And, in fact, the video shows he  
25 did not step toward any staff member after he was

1 separated from the fight. And Officer McCowan  
2 acknowledged that during deposition testimony when  
3 he was given the chance to watch the video there.

4 He was not running around frantically  
5 trying to find a person to assault. I don't think  
6 there's anything in that video that suggests or  
7 coincides with running around frantically. It  
8 appears that he turned his attention to the canine,  
9 which was flying at him at his level, and that  
10 appears to be where his attention was focused when  
11 the canine arrived. And, again, the commands to get  
12 on the ground were given really before he had a  
13 chance to comply. He didn't have a chance to do all  
14 of that before that canine was on him.

15 And then I cited a portion of  
16 Mr. Burwell's report.

17 Q. Number 9. Are you offering the same  
18 materials in support of that?

19 A. Yes. Part of it was Mr. Burwell's  
20 report, part of it's my experience, part of it's  
21 from watching thousands of use-of-force cases, my  
22 own officers that I supervised doing the things that  
23 I'm talking about.

24 Q. Now, I did want to ask about one  
25 component of this opinion. You discussed that

1 Officer McCowan was in no significant danger, K-9  
2 Shadow was trained in handler protection and would  
3 have been a barrier to keep Mr. Johnson away if  
4 Mr. Johnson had approached aggressively.

5 Did Officer McCowan suggest that -- or  
6 attempt to justify that the initial bite of  
7 Mr. Johnson on the ground -- that it was necessary  
8 for him to defend himself?

9 A. I don't recall him making that claim  
10 because he was referencing alleged aggressive  
11 movement toward Officer Mullins.

12 Q. I'll need just one second here,  
13 Mr. Hurley.

14 All right. Just a quick question about  
15 your rebuttal report. On page 14 into page 15 you  
16 discuss the involvement of Dave Robinson, the Chief  
17 of Corrections Operations, one of the defendants in  
18 this case. Is there a particular part of  
19 Mr. Kmiecik's report that you are including this  
20 discussion to rebut?

21 A. He determined that they had adequate  
22 oversight, adequate supervision. So this goes to  
23 the lack of -- lack of responsiveness, lack of  
24 awareness, regarding issues with canine policy or  
25 canine training issues. So I think his lack of that

1 level of awareness does not establish robust  
2 oversight.

3 Q. And so you were just offering that in  
4 response to the general conclusion of -- regarding  
5 supervision?

6 A. Yes. Where the defense expert  
7 referenced that they had adequate supervision as a  
8 group. There was accurate supervision -- and I'm  
9 paraphrasing. And that's also referenced in the  
10 training curriculum as one of the things that's  
11 required for a good -- a valid canine program is to  
12 have adequate supervision or oversight.

13 MR. DAVIS: Okay. I have nothing  
14 further.

15 MR. JOHNSON: All right. I don't have  
16 any follow-up questions for Mr. Hurley at this time.

17 MR. DAVIS: Okay. Thank you,  
18 Mr. Hurley.

19 We can go off the record.

20 (Signature not waived.)

21 (The deposition concluded at 3:51 p.m.)

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**DEPOSITION ERRATA SHEET**

**Case Caption:** Corey E. Johnson v. (K-9) Officer  
McCowan, et al.

**Deponent:** Patrick H. Hurley

**Deposition Date:** September 13, 2022

I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me. I request that the following changes be entered upon the record for the reasons indicated. I have signed my name to the Errata Sheet and the appropriate Certificate and request both to be attached to the original transcript.

Page/Line Nos.	Correction/Reason
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**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
PATRICK H. HURLEY



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CERTIFICATE OF DEPONENT

COMMONWEALTH OF VIRGINIA  
CITY OF \_\_\_\_\_

Before me, this day, personally appeared PATRICK H. HURLEY, who, being duly sworn, states that the foregoing transcript of this deposition, taken in the matter, on the date and at the place set out on the title page hereof, constitutes a true and complete transcript of said deposition.

-----  
PATRICK H. HURLEY

SUBSCRIBED and SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2022, in the jurisdiction aforesaid.

\_\_\_\_\_  
My Commission Expires

\_\_\_\_\_  
Notary Public

1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, William J. Hudson, Electronic Notary  
3 Public for the Commonwealth of Virginia at large, of  
4 qualification in the Circuit Court of the City of  
5 Richmond, Virginia, and whose commission expires May  
31, 2023, do hereby certify that the within named  
deponent, PATRICK H. HURLEY, appeared before me, as  
hereinbefore set forth, and was duly sworn by me.

6 I further certify that I am not related  
7 to nor otherwise associated with any counsel or  
8 party to this proceeding, nor otherwise interested  
in the event thereof.

9 Given under my hand and notarial seal  
this 16th day of September 2022.

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Electronic Notary Public  
Notary Registration No. 7253936

1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, Kathleen Beard Adams, CCR, RPR, CRR,  
3 do hereby certify that the within named deponent,  
4 PATRICK H. HURLEY, appeared before me, as  
5 hereinbefore set forth, and after being first duly  
6 sworn, was thereupon examined upon his oath by  
7 counsel for the respective parties; that his  
8 examination was recorded in Stenotype by me and  
9 reduced to computer printout under my direction; and  
10 that the foregoing constitutes, to the best of my  
11 ability, a true, accurate, and complete transcript  
12 of such examination.

13 I further certify that I am not related  
14 to nor otherwise associated with any counsel or  
15 party to this proceeding, nor otherwise interested  
16 in the event thereof.

17 Given under my hand this 16th day of  
18 September 2022.

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*Kathleen Beard Adams*  
Certified Court Reporter